DOCUMENT RESUME

ED 132 746 EC 091 955

TITLE The Developmentally Disabled: Civil Rights Issues. Final Report.
INSTITUTION Massachusetts State Commission on the Legal and Civil Rights of the Developmentally Disabled, Boston.
PUB DATE May 76
NOTE 102p.; Some pages may reproduce poorly

EDRS PRICE MF-$0.83 HC-$6.01 Plus Postage.
DESCRIPTORS Child Advocacy; Civil Liberties; *Civil Rights; *Court Cases; Due Process; Group Living; Guaranteed Income; Institutionalized Persons; *Legislation; *Mentally Handicapped; Research Projects; *State Programs; State Surveys
IDENTIFIERS *Developmental Disabilities; Final Reports; *Massachusetts

ABSTRACT

Presented is the final report of the Massachusetts Commission on Legal and Civil Rights of the Developmentally Disabled formed to investigate the civil rights problems of developmentally disabled citizens and to recommend and take action to correct the problems. It is noted that the report deals with the following areas: self-determination and financial security with particular emphasis on the representative payee system of the Social Security Administration; treatment, care, and environment of institutionalized persons, specifically medical consent and conditions in state schools for the retarded; housing and a humane accessible environment, specifically the zoning and financing problems that have hindered the establishment of community residences; due process within the criminal justice system for mentally retarded offenders; and the need for a permanent advocate to continue and expand the efforts of the Commission. Each of the report sections is divided into three subsections--findings, actions, and recommendations. Appendixes make up approximately half of the document and include a sample questionnaire for representative payee investigation; a petition and memorandum put before the secretary of the Health, Education, and Welfare; Proposed Amendments to the Social Security Act (H.R. 13195); Personal Fund Bills (S. 478 and S. 480); the Medical Consent Bill (S. 423); the Zoning Bill for Community Residences; and the Massachusetts Housing Finance Agency Assistanct to Community Residences Bill (S. 1190). (SBH)

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THE DEVELOPMENTALLY DISABLED:

CIVIL RIGHTS ISSUES

FINAL REPORT OF THE MASSACHUSETTS
COMMISSION ON THE LEGAL AND CIVIL
RIGHTS OF THE DEVELOPMENTALLY DISABLED

EC091935

FINAL REPORT OF THE MASSACHUSETTS COMMISSION ON THE LEGAL AND CIVIL RIGHTS OF THE DEVELOPMENTALLY DISABLED

May, 1976

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I. INTRODUCTION

The Commission on Legal and Civil Rights of the Developmentally Disabled was created by Executive Order No. 112, Rights of the Disabled, promulgated by Governor Francis W. Sargent and funded over a one year period partially from state funds and partially by a grant from the Massachusetts Developmental Disabilities Council under the provision of the Developmental Disabilities Services and Construction Act of 1970 (P.L. 91-517). The Commission was formed to investigate the civil rights problems of developmentally disabled citizens and to recommend and take action to correct those problems.

These civil rights problem areas, as listed in the Executive Order, were:

a. education, training, treatment, care and housing;

b. self-determination, privacy, dignity and self-fulfillment;

c. a humane and accessible physical, social and psychological environment;

d. work, just compensation, and economic security;

e. voting and receiving due process in the criminal justice system with respect to arrest, legal representation, interrogation, pre-trial diversion, trial, criminal responsibility, competency to stand trial, the right against self-incrimination, disposition and past-adjudicatary remedies.

The Commission was created during a critical period in the story of the emergence of recognition for the rights of the developmentally disabled. Three major forces have collided over these issues: first, the emerging force of judicial, social and political recognition of these rights; second, the momentum of current inadequate systems and institutions; and third, the economic crunch of inflation and recession threatening to reduce present rights and services.

This Commission has provided a voice for the first force pushing the second force to accept changing standards and to limit the damaging influence of the third force.

Almost from its inception, the Commission underwent changes in its staffing, financing and organization which seriously interferred with the continuity of its work. The Commonwealth withdrew all financial support in the 1976 budget and several CETA slots were withdrawn, resulting in a staff reduction from eight people to two. In a June 1975 reorganization by the new administration, the Commission was moved from the Governor's office to the Attorney General's office for the balance of its term.

These adjustments seriously interferred with the staff's capability to accomplish the stated goals of the Commission. The civil rights of retarded people are grossly abused in many different ways, and we could not begin to investigate all of them. Nevertheless, we did succeed in making a number of concrete findings and taking various actions based on those findings.

This report is divided into sections dealing with the separate issues we investigated. We selectively focused on a few areas where we felt out efforts would be most effective.

The areas dealt with in this report are (1) self-determination and financial security, specifically the representative payee system of the Social Security Administration, (2) treatment, care, and environment of institutionalized persons, specifically medical consent and conditions in state schools for the retarded, (3) housing and a humane accessible environment, specifically the zoning and financing problems that have hindered the establishment of community residences, (4) due process within the criminal justice system for mentally retarded offenders, and (5) the need for a permanent advocate to continue and expand the efforts of this Commission.

Each of the sections of this report is divided into three subsections: A. Findings, B. Actions, and C. Recommendations.

II. REPRESENTATIVE PAYEES

A. Findings

1. Background. The key to the realization of many of the civil rights of the developmentally disabled is the possession and control of financial resources. Certainly economic security, self-determination, and dignity are directly related to a person's control of adequate financial resources. Also, the availability of education, training, treatment, care, housing, privacy, proper environment, and due process of law often depends on an individual's financial resources.

For many developmentally disabled persons the only source of income is Social Security (SS) or Supplemental Security Income (SSI) benefits. The Social Security Administration (SSA) is responsible for properly awarding and paying benefits. When SSA decides that a beneficiary cannot manage his funds, a representative payee will be appointed to manage the funds in the best interest of the beneficiary. Investigations by the Commission have uncovered widespread abuse of SS and SSI benefits by representative payees.

These investigations have been in progress since July, 1975, and information for them has been collected from a variety of sources, including social workers, administrators and treasurers at state institutions, legal advocates, citizens groups, beneficiaries, and the SSA itself. The purpose of the investigations has been to ascertain various patterns of abuses, to resolve individual cases, and formulate overall solutions.

2. Appointment of Representative Payees. A representative payee is a person or organization selected by the local district office of the SSA to receive and manage SS or SSI benefits for an eligible beneficiary who the district office determines is unable to do so himself.

Under current regulations (20 C.F.R. 404.1601 and 416.601), the SSA has very broad discretionary power to appoint a payee if it finds such action

to be "in the best interests" of the eligible beneficiary. The regulations do not define "best interests" nor do they offer any guidelines as to how, when, or why an eligible beneficiary should be deemed incompetent to manage his own funds. In fact, certification of payment to a representative payee may be made by SSA "regardless of the legal competency or incompetency of the recipient eligible (for benefits)" (20 C.F.R. 416. 601(a)(1)). In practice, the SSA requires only an application form from the person who seeks to be appointed representative payee and a form signed by a licensed physician which merely alleges that the recipient is incapable of handling his own benefits. If these documents are properly filed with the SSA, a representative payee is appointed.

The regulations for appointment do not provide any right to a hearing prior to appointment. Although they do require notice, it is our finding that in many cases the beneficiary never receives such notice before his check is sent to someone else. The result is that in some cases persons who are fully fiscally competent are being deprived of the right to control and manage their own funds without a fair determination that they are unable to do so. This outcome is a serious violation of the beneficiary's right to due process and a damaging blow to a person's need for dignity and self-determination.

3. Supervision of Representative Payees. After the SSA has appointed and has begun sending benefit checks to a representative payee, he must submit a periodic accounting "at such times as the (SSA) may require" explaining how these funds have been used (20 C.F.R. 404.1609 and 416.690).

In practice, our investigation has found that the supervision of representative payees is almost non-existant. The accounting forms themselves do not require detailed descriptions or receipts of purchases: only general descriptions of how the money was spent. One field representative at a SSA district office has stated that most accountings were stopped in March, 1969, when it was decided by the SSA that few problems existed with regard to representative payees.

Therefore, such accountings were considered to be a waste of time and money. The regional office of SSA has conceded that accountings were discontinued in 1974 due to the increased work burden imposed by the new SSI program. A system of selective accountings is supposed to have begun again. However, despite repeated requests to be shown a routine accounting received by SSA, this Commission has never been shown a single one. It appears that SSA will normally ask for an accounting only when a third party lodges a vigorous complaint.

SSA policy officially favors appointment of payees outside of an institution on the theory that such an appointment would increase an institutionalized beneficiary's contact with the outside world and therefore would be therapeutic. We have found this to be a fallacious presumption in many cases. Often just the opposite occurs: The outside payee will not visit the beneficiary. In some cases, the payee wishes the beneficiary to remain in the institution so that the payee can retain control over and, in the worst cases, make personal use of the beneficiary's money.

A further problem is caused by SSA's interpretation of the 1974 Privacy Act to prohibit its local offices from revealing any information from a beneficiay's file to the staff at the custodial institution. Institutions wishing to request increased fiscal or material support from a representative payee are prevented from discovering who the representative payee is under this interpretation. In some cases, the staff of institutions were even unaware that a resident was receiving benefits through a representative payee. Surely it was not the intent of the Congress to provide protection to unscrupulous payees in passing the Privacy Act but that has been the unfortunate result.

4. Security Posting by Representative Payees. The current SSA regulations regarding payee accountability do not require any form of security for or bonding of payments to representative payees. A possible consequence of such ineffective accountability provisions is a total loss of funds paid out on

behalf of a beneficiary if the representative payee disappears, goes bankrupt, or dies impecunious. It should be noted that the Veterans Administration as well as guardianship and conservatorship statutes in every state provide for the requirement of legal security. The SSA is unique in that it does not.

5. Investigation of Abuse. The Commission developed its data on the misuse of funds by representative payees through inquires made at five state schools - Belchertown, Dever, Fernald, Monson, and Wrentham - as well as through less formal contacts with state hospitals and community residences.

Initially, the Commission solicited information on apparent abuses by representative payees from social workers and administrators at these schools and institutions. The decision was made to concentrate our survey on the five state schools. Relying upon the information supplied by these schools, the Commission then secured permission for access to the individual school's records from the Department of Mental Health (DMH). Investigations at the schools were then conducted.

Using a questionnaire developed by the Commission (Appendix A), staff members visited the schools, reviewed patient files in the treasurer's offices and medical records offices, and interviewed administrators, social workers, special service assistants and some residents with representative payees.

The cases we reviewed included beneficiaries who were competent to handle their own benefits as well as those who were clearly not competent to handle their own benefits.

The results of the investigation are startling. In the course of reviewing over 100 cases, we developed evidence of over fifty cases of apparent abuse or misuse of funds (Appendix B). We found that some schools are doing more than others to remedy the problem with payees. At least one school has little awareness that the problem does in fact exist. Some schools, while aware of the problem, have little idea of what they can do to resolve it,

or are hindered by SSA regulations and procedures from doing anything at all.

Overall, there is no effective SSA or Commonwealth policy for discovering, combating, resolving, and guarding against misuse of SSI or SS benefits by representative payees.

Of special note is the Fernald State School, where a full-time staff member has been assigned to deal with the SSA. She has discovered - often by circuitous routes - at least 50 cases of misuse of funds by representative payees in the past year. Most of these she has resolved by requesting that the SSA change the payee to the superintendent of the institution. Since these cases had been resolved before our investigation, they are not included in the cited figures.

In all schools, the Commission found a large "grey area" where funds were not provided to the beneficiary by a representative payee, but it was not clear who was at fault. In some instances, social workers had never requested money or clothing from the representative payee. It is possible that many of the cases could have been resolved by more aggressive actions on the part of the staff of the institutions.

Of course, the practice by SSA of not informing an institution of the identity or existence of a payee has made it very difficult for either the institution or this Commission to document the full extent of the abuses.

Of the abuses uncovered, four major patterns have emerged:

a. where representative payees have been found to be using the money for themselves;

b. where representative payees refuse to send the institution any money at all for the use of the beneficiary;

c. where the representative payee refuses to send enough money to fulfill requests by the institution; and

d. where there is a total lack of contact between the beneficiary or the institution and the representative payee.

Finally, the Commission discovered that the existence of this problem was not widely recognized, except by isolated organizations and individuals, on both the state and national levels.

B. Actions

In an effort to resolve this misuse of SS and SSI funds described above, the Commission has taken action in a number of areas which include:

1. petitioning the Department of Health, Education, and Welfare (HEW) to change its method of appointing and supervising representative payees;

2. bringing Congressional pressure to bear upon SSA/HEW to adopt the proposed changes;

3. conferring with the United States General Accounting Office (GAO) to encourage them to investigate the representative payee system;

4. filing state legislation to help identify representative payees of institutionalized persons;

5. advocating refinements on patients' funds regulations to provide greater protection for SSA funds received by state institutions;

6. developing a summary of information on SSA benefits to be used by the staff of institutions;

7. contacting other organizations to develop a broader basis of concern for these problems; and

8. resolving individual problems and complaints involving representative payees in whatever method appropriate.

1. Petition. On March 15, 1976, this Commission petitioned the Secretary of HEW to adopt new regulations for the appointment and supervision of representative payees (Appendix C). The petition was co-signed by the Attorneys General of Massachusetts and Connecticut. The proposed regulations require a specific finding of fiscal incompetence on the part of the beneficiary before the appointment of a representative payee. They also provide for prior notice and an oppor-

tunity to be heard before an appointment is made. Further, they would mandate an annual accounting to be filed with SSA. Finally, they would demand that a surety bond be posted by the representative payee.

2. Congressional Pressure. The Commission has been in contact with Representative Bingham of New York, who has been concerned with the representative payee problem. On April 13, 1976, Mr. Bingham introduced a bill, H. R. 13195, to amend the SS and SSI Acts to provide a statutory basis for the proposed HEW regulations (Appendix D). The office of Senator Kennedy of Massachusetts has also been contacted and similar legislation will probably also be filed in the Senate.

3. GAO Investigation. A meeting was held on April 12, 1976, between members of the Attorney General's office, the GAO, and the Commission concerning the representative payee problem. Since the GAO is an agency of Congress charged with overseeing how federal funds are spent, its staff was interested in the issue of misappropriation of SS and SSI monies. The GAO has initiated a survey of the representative payee system that will consist of a close examination of a randomly selected set of cases to discover how widespread the abuses are. The expected result of this investigation will be a report to Congress which the Commission feels will bolster the filed legislation.

4. State Legislation. To remedy the problem of accountability of representative payees, the Commission has worked with State Senator Chester Atkins on two bills - S. 478 and S. 480 (Appendix E) - which would require stricter accountability procedures for Massachusetts representative payees when the beneficiary has been institutionalized. They include a requirement that all representative payees of SS and SSI benefits register with the state Department of Public Welfare or the DMH for persons residing in nursing homes or state institutions, respectively. The bills have been broadened to place these requirements on all persons with fiduciary relationships to institutional-

ized recipients of SS and SSI benefits. They have received favorable reports from the Human Services Committee and have a good chance of being enacted this year.

5. Patients' Funds Regulations. DMH has been in the process of revising its regulations regarding the handling of patients' funds for several years. The Commission has been providing input to these regulations from the perspective of safeguarding the patients' right to control their own funds when they are capable of managing them. DMH has responded favorably to our suggestions and the new Section 14 of DMH regulations provide excellent safeguards for the rights of patients.

6. SSA Manual. The Commission has developed a manual which is a practical summary of our experience and research into the representative payee situation. (Appendix F). This manual is designed to provide practical advice for the institutional staff in the handling of SS and SSI funds. The Commission felt that the manual is needed because of our finding that many staff members are not "experts" in dealing with the SSA and could use a summary of their options in this area. The manual was developed and distributed through the cooperation of DMH.

7. Organizing Efforts. The Commission has attempted to organize a national lobbying effort to support our legislative and administrative proposals. Many cases have been filed in federal court in recent years challenging the constitutionality of the representative payee procedures. The Commission has contacted the initiators of these suits in California, Mississippi, Illinois, Missouri, Maryland, Ohio, and Washington, D. C. and has asked for their support of our proposed changes.

8. Individual Cases. At one time, the Commission considered bringing legal action against HEW to force a change in regulations. This plan of action was discarded because of our lack of resources and the current state of adminis-

trative law which made a sucessful law suit problematical. To prepare for the possible law suit, to educate the institutional staff as to possible administrative remedies, and to help resolve some of the cases we uncovered, the Commission became a party to administrative changes and appeals for over thirty individuals.

Briefly, the procedure for changing a representative payee requires that either the beneficiary or the superintendent of the custodial institution apply to receive the benefits. The Commission assisted the applicants in filling out the proper forms (SSA # 11, 780, 780A and 787, see Appendix F) and sent along a demand letter, requesting a change in payee and an accounting of funds.

Our own efforts in this area have been hampered by the SSA's interpretation of the Privacy Act, the slow response from SSA district offices - partially caused by a requirement of contacting the "program center" in New York, and sometimes by slow responses from institutional social workers. Several cases have been resolved in the favor of the beneficiaries, but the bulk of them were still pending as the term of this Commission expired. It is this sort of legal discontinuity that makes the establishment of a permanent advocate for the rights of the developmentally disabled so important. (See page 27.)

C. Recommendations

Much remains to be done before the problem of representative payee misuse of SS and SSI funds is solved.

The inquiry the Commission has begun at the state schools should be expanded to involve state hospitals and other institutions - be they public or private - where eligible beneficiaries who receive their benefits through representative payees might reside.

There is also the whole area of representative payee misuse of funds of non-institutionalized beneficiaries. We have researched this area only slightly, but the potential for abuse exists in this area as well.

We recommend that all cases of apparent abuse of Social Security funds which we have already investigated be followed up and that legal action be instigated if it be deemed necessary.

The petition for the adoption of the proposed rule changes and the federal legislation should be followed up in whatever way appropriate.

The GAO should be kept informed of any new information available on representative payees and be strongly encouraged to continue their probe into the matter.

The legislation filed by Senator Atkins concerning registration and accountability of representative payees must be supported in whatever way appropriate.

The most important steps to take now are to increase the awareness in the Commonwealth. To this end, the pamphlet developed by the Commission summarizing our experience in this area (Appendix E) should be distributed widely throughout the Commonwealth. Also, the idea of convening a state-wide conference of all those who are concerned with the question of how to expose and resolve the problem of misuse of Social Security funds by representative payees should be investigated with the hope that the end result would be the development of a co-ordinated, statewide action program to deal with the problem.

III. INSTITUTIONALIZED CITIZENS

Over six thousand citizens are presently living in the five large state schools. In addition, many persons with developmental disabilities are living in the state hospitals. Thus, the treatment and environment provided by the state for these persons has been a concern of this Commission.

MEDICAL CONSENT

A. Findings

We first became interested in these issues after reviewing the pleadings in Rogers v. Macht (the "Boston State" case), in which the plaintiffs, represented by Boston Legal Assistance, alleged that they had been subjected to seclusion and forced medication while they were patients at various DMH facilities. We then began an investigation into the legal-medical problems of institutionalized retarded people. We conducted this investigation by reviewing litigation in the Commonwealth and in other states, reviewing the common law background of medical consent, and by interviewing doctors, institution personnel, and lawyers who have represented the retarded on questions of medical consent.

We found that there is generally a great deal of confusion among medical and legal professionals about how and when medical consent should be obtained from mentally retarded individuals, and who should properly give consent. This confusion has been documented in prior research done for the Bureau of Developmental Disabilities.[1] There is no clear definition of what level of comprehension is needed for a person to refuse or consent to treatment on his own behalf, and no clear or accepted procedure for obtaining substituted consent when the patient is incompetent to make his own treatment decisions. In the institutional setting, this confusion is exacerbated by the Massachusetts case of Belger v. Arnot, 344 Mass. 678, 183 N.E. 2d

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1. See "The Mentally Retarded Adult in the Community: Some Critical Legal and Social Issues" by Christina Bloom and Ruth Walsh, August '74.

866 (1962), and by certain DMH regulations (generally, S. 220) which suggest that no consent is needed for medical treatment of a person institutionalized in a DMH facility. This confusion has generated two specific problems, both of which are recognized nationally as serious civil rights issues.

First, institutionalized people are subjected to "intrusive" medical treatments without their consent. "Intrusive treatments" include electroshock therapy, psychotropic drug therapy, aversive therapy, sterilization, and psychosurgery. Patients and residents are sometimes subjected to these treatments without their consent ever being solicited, or with the consent of a third person, such as a brother or sister, being substituted for the patient's own consent. Of these forms of treatment, psychotropic drug use is the most prominent source of problems. Excessive drug use has become a standard allegation in the "right to treatment" lawsuits in the Commonwealth. Consent is almost never obtained for this kind of medical treatment.

Second, essential medical treatment is sometimes delayed or omitted altogether because confusion surrounding the type of consent which is needed and the proper manner of getting it. This problem occurs when the patient or resident is incompetent but has no guardian or interested next of kin. Lawyers who encounter this situation frequently have invented different procedures for dealing with it. In one case, a lawyer who worked for the Shriver Center found it necessary to bring a petition before the Supreme Judicial Court each time a medical operation was proposed for an incompetent. The Mental Health Legal Advisors Committee handled one case in which a cancer patient who was a resident of a state hospital received no treatment at all for more than a year before legal questions of consent were finally resolved, during which time the patient was frequently in pain.

B. Actions

The Commission drafted legislation which was filed in this session by Senator Atkins (Senate Bill 423. See Appendix G.) This bill would eliminate the

above problems by establishing definitions and procedures to be followed in obtaining medical consent for residents of state institutions. The bill establishes three categories of treatment. The first category, including psychosurgery and sterilization, can be administered only with the patient's own valid consent. The second category includes electroshock and psychotropic drug therapy. This type of treatment can be administered only with the person's own consent or with the consent of a legally appointed guardian or parent of a minor who has obtained the permission of a probate court to consent. The third category is emergency treatment, and this may be administered with the consent of a next of kin or the chief medical officer of the institution. The bill does not purport to deal with other medical treatments not specifically named.

C. Recommendations

Passage of Senate 423.

PERSONNEL AND PHYSICAL PLANT

A. Findings

During the Commission's tenure, several law suits were instituted by citizens' groups against the Commonwealth because of its alleged violations of the civil rights of residents of state schools for retarded citizens. The cases were Gauthier v. Benson, McEvoy v. Goldmark, Ricci v. Greenblatt, and Massachusetts Association for Retarded Citizens (MARC) v. Dukakis. The three main complaints were that the Commonwealth was not maintaining staffing ratios at the authorized levels, was not expending authorized funds for capital expenditures on the physical plant of the schools, and was not providing the statutorily mandated educational programs for residents. This Commission has reviewed these cases and feels some of the findings are so important that they should be noted in this report.

The Gauthier v. Benson case was brought by the parents of several residents of Monson State Hospital:it can serve as an example of the issues involved.

They alleged that, among other things, the Commonwealth acted illegally by impounding capital improvement funds, and imposing a personnel freeze. As a result of these activities, the living conditions at Monson were alleged to be deplorable. Among the horrors at Monson are primitive toilet facilities, a heating system that results in extreme temperature differentials from 90 to 50 degrees between buildings, inadequate staffing resulting in some residents living in their own bodies' waste, and, generally, a sad tale of neglect, filth, degradation and hopelessness.

The Commonwealth's response was to investigate these allegations. Finding that the allegations were mostly correct, the Commonwealth did not contest the suit. Instead, negotiations were started on consent decrees. The most interesting aspect of the consent decrees was that the Commonwealth agreed to do things that were already authorized by the legislature. For instance, it agreed to end a hiring freeze and reduce the vacancy rate for alloted personnel positions to five per cent or less. Further, it agreed to spend monies already allocated for capital expenditures which had been impounded. Thus, the outcome of the suit did not require the Commonwealth to make any new commitments for more expenditures (although it pledged to make its best efforts to have its appropriations increased).

Another law suit, MARC v. Dukakis, dealt with the issue of how well the Commonwealth was fulfilling the requirements of Chap. 766 to provide training for children with special needs. The Commonwealth has the responsibility to provide this special needs training for the 2600 school age children living in its institutions. The suit alleged that the fiscal year 1976 allocation of 7.2 million dollars to this program is grossly inadequate and barely sufficient for salaries to current staff and for carrying out core evaluations of the residents. To provide a program minimally adequate to meet Chap. 766 standards would cost $7,184 per pupil. For fiscal year 1976 only $1,977 per pupil was allocated by the legislature.

This suit is a long way from a final outcome. The possibility of a consent decree is doubtful. A study is in progress to determine precisely how the current appropriation is being used and what additional steps should be taken.

These law suits were the result of inappropriate and shortsighted fiscal decisions made by the Commonwealth. Apparently, the economic problems of the Commonwealth caused a "short-circuit" of the orderly deinstitutionalization policy of DMH. Chronic understaffing in the institutions became worse. Capital expenditures were postponed. These "inactions" were justified by the planned reduction in resident population. At the same time, community residential facilities were not being developed to supplant the institutions.[2] As discussed in the section on Community Residences, not all of this delay can be attributed to DMH directly.

B. Actions

Research and investigation described above.

C. Recommendations

The procedure of caring for developmentally disabled persons in large state institutions is inappropriate for most of these persons. While the worst conditions in the institutions must be eliminated, this Commission is committed to deinstitutionalization. It is essential for legal and humanitarian reasons to develop community residences and other residential alternatives throughout the state. Specific recommendations to speed this process are included in the next section. The emphasis of present capital outlay in state institutions should be on improvements that will benefit the eventually reduced population. It would be a tragic step backward if these suits by parents resulted in increased appropriations for the outmoded state institutions at the expense of community alternatives.

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2. Commissioner Okin of the DMH admitted to the Senate Human Services Committee on March 23, 1976, that none of the 106 planned new community residences for fiscal 1976 had been started.

IV. COMMUNITY RESIDENCES

While the need for community residences is great, the current supply is limited. The speed of development of more community residences will be determined by legislative funding, administrative efficiency, community attitudes, and financial resources. The Commission investigated two of these areas: community attitudes as expressed in zoning laws and financial resources available from public housing agencies.

ZONING

A. Findings

Sponsors of community residence facilities for mentally retarded adults and children have experienced serious problems with local zoning regulations. A study done by Glen Johnson of the Harvard School of Education showed that in '72 and '73, respectively, 43% and 36% of all projects to start community residences for retarded persons failed completely because of zoning problems. Zoning for community residences has been a persistent source of litigation and there are at the present time two major lawsuits pending, one in the SJC, involving community residence zoning.

Most cities and towns do not have any zoning policy for community residences, but simply fit them into some other existing category such as "boarding house." Sponsors are thus greatly restricted in their efforts to find suitable residential locations for community residences since single and multi-family zones are closed to community residences unless the sponsor is able to obtain a variance. The process of obtaining a variance is expensive, time consuming and risky, and sometimes the process itself acts to generate opposition where normally there would be none. In many cases the delay involved is, in itself, enough to kill a project, since the sponsors are not able to tie up rental property for a sufficient length of time to get zoning clearance.

Some cities and towns, such as Cambridge and Northampton, have accepted the community residence concept and granted necessary zoning clearances. However, many more cities and towns have used zoning as a way of totally excluding community residences from their boundaries. As a result, many mentally retarded people are effectively prevented from living in their own home towns. This use of zoning laws has been recognized nationally as a serious civil rights problem.

Between now and 1980, DMH's plans call for the opening of approximately 300 new community residence facilities. At the present time there has already developed a certain concentration of these facilities in towns that are willing to accept them. In order to insure a proper distribution of the planned new facilities and to open the doors of "closed" communities, the Commonwealth must develop a uniform zoning policy which restricts the power of local communities to totally exclude congregate living facilities for the mentally retarded. The failure to develop such a policy will eventually lead to serious delays in the opening of planned new facilities and to inappropriate locations for new facilities, with a tendency toward concentration in run-down and industrialized areas.

B. Actions

The Commission organized a cooperative effort between the Office for Children, the Massachusetts Associated of Retarded Citizens, the Bureau of Developmental Disabilities, and the Commission to draft and support legislation which would establish a uniform policy of the Commonwealth for zoning for community residences (see Appendix E). This bill created and preserved for the localities a significant amount of control over community residence facilities, including the authority to use zoning laws to impose "any reasonable condition" before a special permit is granted to a community residence facility and the authority to refuse such a permit if there is an undue concentration of such facilities in the

town. Further, the bill stated that a community residence is a residential use and is therefore permitted in all residential zones. Local communities would be prohibited from enacting zoning ordinances which excluded community residences.

The bill has been ammended (Appendix H: Amended Version), requiring local communities to accept community residences only when they consist of six of fewer individuals.

C. Recommendations

While the present form of the bill is a step forward, its passage would be a hollow victory as most community residences need to contain eight or more persons to be feasible. Hence, this Commission does not support it.

The bill has been sent to the House Rules Committee for a "study." This step will provide time needed so that DMH and other organizations have an opportunity to allay the misgivings of legislators and their constituents by means of a vigorous education campaign. This Commission recommends that the bill be returned to its original wording and passed as soon as possible.

FINANCING

A. Findings

The Commonwealth's plans for deinstitutionalization of the population of the state schools call for the opening of at least three hundred new community residence facilities before 1980. The Commonwealth is fully committed to deinstitutionalization and cannot abandon its plans without defaulting on the "Title XIX" federal reimbursement program and violating various federal court orders. Accordingly, some means must be found to finance the development of the new community residence facilities.

Under present arrangements, community residence facilities are operated by private sponsors who contract with DMH. In most cases, the sponsors rent housing on the open market at prevailing market prices. In a small number of cases the

sponsors own housing and make regular mortgage and tax payments. As a result, the direct housing costs of community residence programs tend to be very high. These high housing costs have been one of the primary factors in the severe financial problems experienced by almost all community residence sponsors in the past few years. These problems have worsened to the point that many sponsors are not willing to open any new facilities because of their inability to meet obligations on existing ones.

Public housing assistance could alleviate much of this problem and facilitate the development of new community residence facilities. However, despite the fact that virtually all residents of community residence facilities are near poverty level and are eligible for housing assistance, public housing money has not been available for community residence facilities. The term "public housing money" includes federal rental assistance and mortgage insurance and mortgage money from the Massachusetts Housing Finance Agency (MHFA). The Commonwealth recently created a $10 million bonding authority in CDCA for the development of handicapped housing. It is now apparent, however, that the $10 million will be divided among various housing programs; and even if the $10 million were devoted entirely to community residences for the mentally retarded, it would not be sufficient to cover planned development. A method must be found to channel public housing funds into community residence development.

There are several reasons why public housing authorities such as HUD and MHFA have not supported community residence programs in any significant way. Federal agencies have shied away from community residence programs because they have not yet developed any coherent policy for dealing with congregate living facilities, even though the National Housing Act of 1975 specifically authorizes use of federal funds for congregate housing. The MHFA has not provided development funds for community residences because they are unfamiliar with the concept, have not

tried it before, and do not wish to try anything new. They also voice doubts about the long term financial viability of community residence programs.

B. Actions

The Commission is supporting a legislative proposal filed through Senator Atkins office to expand the stated mandate of the MHFA to cover community residence programs - Senate Bill 1190 (Appendix I). This bill would not produce any mandatory expenditures but merely demonstarte a legislative intent that public housing funds be used for community residence programs.

The Commission tried unsuccessfully to secure the appointment to the governing board of the MHFA of a man who was knowledgable and sympathetic to the needs of community residence programs.

We have communicated at length with Senator Kennedy's office in an effort to bring pressure to bear on HUD and FHA to promulgate coherent policies and standards for dealing with congregate living arrangements, so as to clear up some of the log jams caused by confusion in the local federal housing agencies about congregate living arrangements.

C. Recommendations

1. Passage of Senate 1190.
2. Appointment to board of MHFA of a person who knows something about community residence programs.
3. Development of congregate housing policies by HUD.

V. MENTALLY RETARDED OFFENDERS

A. Findings

Our research into this area consisted of reviewing studies done previously in this state and other states,[3] interviewing correctional officials, probation and parole officials, lawyers from the Mass. Defender's Committee, and people from various county correctional services and social service agencies. We also collected information on about twenty five criminal cases involving mentally retarded defendants. Finally, we reviewed theoretical materials regarding treatment and rehabilitation possibilities for mentally retarded offenders.[4]

Based on these investigations we have arrived at several conclusions: first, an analysis of various available statistics[5] would tend to indicate that there are at least three hundred to five hundred mentally retarded people convicted of criminal offenses each year. Contrary to our initial expectations, we concluded that identification and recognition of these people in court is not a serious problem (although there may be some problems with recognition by police officers). Virtually all of the defense attorneys we contacted were quite capable of recognizing

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3. Studies in this state include The Report of the Task Force on the Mentally Retarded Citizen and the Criminal Justice Process, Paul Chernoff, Chairman; the final Report (BASICS) of the Committee on Corrections and Mental Health of the Massachusetts Bar Association; the 1966 Report of the Attorney General's Advisory Committee on Juvenile Crime; studies in other states include Study of Mentally Retarded Public Offenders, Legislative Council Committee, State of Tennessee; The Mentally Retarded Offender, the President's Commission on Law Enforcement; Texas Report on the MRO, by Haskuis & Freil, 1973; Mentally Retarded Adult Offenders, South Carolina Department of Corrections, 1974; Mentally Retarded Offenders in Adult and Juvenile Correctional Institutions, Kentucky Legislative Research Commission, 1975; The Developmentally Disabled Offender in the Illinois Criminal Justice System, Correctional Services, 1975; and Diversion: From the Legal to the Health-Care System - A Method, Bernard Rubin, 1975.

4. See for example Halfway Houses, Keller & Alper (Lexington, 1970); "A Rural County in Sweden," by Karl Greunwald, in Changing Patterns in Residential Services for the Mentally Retarded, the President's Committee on MR; "Supported Work for Mentally Retarded Parolees," prepared by Robert Shapiro for the Mass. State Parole Board.

5. The Task Force Report (see note 1) found that the Court Clinic program

or at least suspecting mental retardation, even where it had not been professionally diagnosed. The court clinics actually identify about two hundred cases of mental retardation per year. (These two hundred come from only half the court clinics. The other half apparently do not attempt to make any "identification.")

The lack of formal identification of mentally retarded defendants probably stems not from an inability of lawyers and judges to recognize mental deficiency but from the lack of a purpose for making any identification. Services and programs for retarded delinquent individuals are practically non-existent. The making of an "identification" of retardation is thus a futile exercise since it has no effect on the way a case is handled. DMH sometimes accepts cases on an ad-hoc basis but generally avoids them and has no specific programs for dealing with delinquency. The Division of Youth Services (DYS) and the Parole Board (PB) each have proposals for small facilities capable of serving a few individuals. There is nothing else.

This lack of treatment facilities presents a sentencing judge with two choices; he can do nothing, or he can have the retarded offender locked up. When

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identifies about 200 defendants each year as being mentally retarded; however, these 200 come from only half the clinics. The other half of the clinics including Cambridge, Quincy, and South Boston, identify none at all. It is safe to assume that there are many more than 200 retardates involved in criminal cases each year.

"The Mentally Retarded Offender," by Brown and Courtless estimates that 9% of the nationwide prison population is mentally retarded. In the 1966 Attorney General's Report (see note 1) more problems arising from cases involving retarded youths. The Department of Youth Services estimates that it deals with about 200 retarded youths each year (see "Programs for Aggressive Retarded Youth" by DYS).

A survey of probation officers by the Task Force indicated that 1022 cases (4.2% of the total caseload) were thought to involve retardation.

The Judge Baker Clinic estimated that about 12% of the cases referred to it by DYS and the courts involved mental retardation.

the crime is a serious one, the judge is forced to send the defendant to prison, for want of any other way of getting him off the street.

Once the retarded offender is in prison, he is subject to a number of special risks. Very often a retarded inmate is subject to victimization by other prisoners, or is unable to adapt his own behavior to the prison routine. If he becomes an administrative problem for one of these reasons, he may be placed in "protective custody" (a form of solitary confinement) or transferred to a ward at Bridgewater. Although transfers from prisons to Bridgewater are streamlined and quick, it is next to impossible to have an inmate transferred from prison into a DMH retardation facility, largely because of the reluctance of retardation facilities to deal with these cases.

As a result, the mentally retarded offender may be treated leniently until his behavior becomes intolerable to society. At this point he is sent to prison where he is subject to risks greater than those experienced by the normal inmate.

Programs in other states and other countries[6] have indicated that delinquent behavior by retarded people can be effectively dealt with under close supervision. Some findings have shown that retarded offenders have a greater chance of successful rehabilitation than normal offenders.[7] Even if they cannot be successfully rehabilitated, it seems clear that retarded offenders should not be subject to any greater risk than normal offenders.

B. Actions

Research and investigation described in Findings.

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6. See "The Mentally Retarded Offender," by Susan Giogari in Crime and Delinquency Literature, sec. 171.

7. See Greunwald, op. cit., p. 267.

C. Recommendations

It is imperative that DMH or the Department of Corrections and DYS or a new governmental agency develop community based facilities for retarded individuals who have demonstrated delinquent behavior patterns. The facilities would provide a sentencing alternative for a judge who sympathizes with the special needs of a retarded offender but wants to see the defendant placed in a closely supervised setting.

The solution to the mentally retarded offender problem is urgently needed but at the same time is very complicated because it falls in the "cracks" between the current agencies and institutional establishment in Massachusetts. We know the problem exists and we know what must be done (see footnote 3, page 23). There simply is no single agency in Massachusetts with the expertise and budget to build and maintain the required training and detention centers for the retarded offender. This Commission strongly recommends that a special agency of government be established with sufficient funding to provide the needed alternative.

VI. PERMANENT ADVOCATE

A. Findings

Over the past several years a number of Massachusetts groups have involved themselves with the civil rights of the developmentally disabled. These have included the Patients' Funds Task Force, the Friends of Belchertown, the Committee on Corrections and Mental Health of the Massachusetts Bar Association, the Massachusetts Association of Retarded Citizens, the Bureau of Developmental Disabilities and others. These groups have addressed themselves to particular issues or clusters of issues. Separate civil rights problems have been investigated and documented effectively. However, none of these groups has been able to operate long enough with sufficient funding, staffing, and organizational direction to produce any tangible results. As noted in the introduction to this report, this Commission, as well, has in its year of operation been able to identify particular problems but at this point will not be able to follow any of these projects to completion. There are numerous well documented reports and findings but little in the way of effective action. The only exception to this pattern has been the federal litigation undertaken by private groups such as the Friends of Belchertown and the Massachusetts Association of Retarded Citizens. This litigation has been a singular effective source of positive change.

Furthermore, in the governmental context, there is very poor coordination between the many state and federal agencies which deal with retarded citizens. These include the SSA, DMH, DYS, Massachusetts Rehabilitation, the Department of Public Health, the Department of Public Welfare and various municipal authorities.

These problems could be substantially remedied by the creation of a permanent advocate for the civil rights of the developmentally disabled with full authority to draft and file legislation and to legally represent individual

clients. It is a debatable proposition whether such an advocate should be located in the government or be totally independent, on the legal services model. There are advantages and disadvantages to each arrangement. A "private" advocate would be freer to institute litigation against the Commonwealth but quite possibly less effective in dealing administratively with state agencies and indealing with the Legislature. A government based advocate, on the other hand, might be seriously constrained in its ability to sue the Commonwealth, and it must be noted that in the past few years legal actions against the Commonwealth have been the single most significant source of positive change in this area. In any event, a government based advocate should have a guaranteed built in independance comparable to that of the Massachusetts Defenders or the Mental Health Legal Advisors in order to insure optimal effectiveness and proper representation of clients.

B. Actions

This Commission has been attempting to discover funding sources for the establishment of a permanent advocacy agency for the developmentally disabled. The federal Developmentally Disabled Assistance and Bill of Rights Act of 1975 requires that each state has such an agency "in place" by September 30, 1977.

To assist the states in establishing these agencies, the statute authorized a total of $3,000,000 to be made available to the states. Massachusetts will receive $42,000 from June, 1976 to September, 1977 and probably $60,000 annually thereafter.

This Commission has been involved in the process of selecting the receiving agency for these funds. A final selection will not be made until the fall, 1976.

C. Recommendations

A careful study of existing advocacy organizations is necessary to determine what agency will be the best recipient of these funds. However, this

Commission recommends the following guidelines for the selection process:

1. Since the amount of federal funds is so small and since state funding is uncertain, the funds should go to an established agency rather than try to create a new organization out of these limited funds.

2. The statute requires that the receiving agency be "independent" of any state agency that is involved in providing care and treatment for the developmentally disabled. Hence, if a state agency is designated as the advocacy organization, it should be insulated from the state political process. One way to accomplish this would be to make the organization a part of the judiciary, as the Mental Health Legal Advisors Committee is organized. Another possibility is to have the organization be a "special" branch of the Attorney General's office with a clear mandate to bring litigation against the Commonwealth, if necessary.

3. Since the funds are so limited, the number of developmentally disabled persons that can be represented by an agency funded solely by these funds will be insufficient to fulfill the goal of providing widespread representation. To maximize the population that can be reached, extensive use of paralegals and law students should be made. Hence, law school legal aid programs should be seriously considered to be named as the advocacy organization.

4. The advocacy center should be "on-line." The best way to develop issues is from actual cases and controversies which result in legal actions. The momentum provided by clients with line problems helps to prevent the current syndrome of issues being identified but not acted on. This Commission strongly recommends that the developmental disabilities advocacy center be structured around client service with a secondary, but viable, emphasis on statutory and regulatory reform.

Appendix A

QUESTIONNAIRE

I. BENEFICIARY

A. PERSONAL

Name

Date of birth

Place of birth

Current address

Date of admission to hospital

Marital status

Social security number

Type of developmental disability

Classification

Education

Legal competency: has beneficiary ever been declared incompetent by a probate court?

If so, who is legal guardian ?

Fiscal competency: does beneficiary know the value of money? What are the facts indicating fiscal competency or incompetenc

B. EMPLOYMENT

Has beneficiary ever been employed outside of hospital?

Is beneficiary currently employed inside of hospital?

C. FINANCIAL

Does beneficiary have any income exclusive of social security benefits?

Does beneficiary have any unmet financial needs at present?

How much money is in beneficiary's account in the hospital?

Is this amount sufficient to cover beneficiary's needs?

D. SOCIAL SECURITY BENEFITS

What is the type of social security benefits currently received?

SSA - type:

dependent disabled child

survivor's benefits

other -

SSI

When were benefits first received?

What is the amount of benefits per month?

What is total amount of benefits paid since commencement of benefits

Who applied for benefits?

Is beneficiary aware that the social security benefits belong to him/her (ie. that the money is his/hers)?

E. COMMITTMENT

Date of committment to current hospital ?

Was beneficiary ever previously committed ?

Where?

When?

What is the type of committment?

Voluntary

Involuntary

by whom?

under what circumstances?

Diagnosis

Type of therapy

Future plans (goal)

F. OUTSIDE CONTACTS

Does beneficiary have any visitors?

Who

How frequent

Most recent visit

Does beneficiary ever leave hospital for visits?

Where

Frequency

Most recent visit

Is opportunity for outside visitation ever impeded by lack of funds?

Does beneficiary have any lvivng relatives not mentioned above?

II. REPRESENTATIVE PAYEE

A. Who is current representative payee?

Name

Address

Occupation

Age

Relation to beneficiary

Health status

Social security number

Telephone number

B. APPOINTMENT

Date of appointment

Who initiated action for appointment ?

Did beneficiary receive pre-appointment notice?

Was beneficiary satisfied with appointment?

Has appointment ever been disputed?

Has there ever been a different representative payee?

C. FUNDS PROVIDED TO BENEFICIARY BY REPRESENTATIVE PAYEE

What is amount representative payee currently provides beneficiary per-month?

Money

Clothing

Other

Previous monthly provision

Money

Clothing

Other

What is being done with remainder of beneficiary's funds?

D. ACCOUNTING

Frequency of accountings made by representative payee?

Are the accountings accurate?

How complete are the accountings?

E. RELATIONSHIP BETWEEN REPRESENTATIVE PAYEE AND BENEFICIARY

Do representative payee and beneficiary get along well?

Does beneficiary wish to be receiving more funds from representative payee?

Has beneficiary ever requested more funds from representative payee directly?

Does beneficiary wish representative payee to be changed ?

Does beneficiary wish to receive benefits himself/herself?

F. RELATIONSHIP BETWEEN SOCIAL WORKER AND REPRESENTATIVE PAYEE

Who is the social worker?

Name

Address

Telephone number

What is the length of time he/she has served as beneficiary's social worker?

Does social worker know who is beneficiary's representative payee?

What is the frequency and type of contact between social worker and representative payee?

Is representative payee co-operative with the social worker?

Does social worker inform representative payee of beneficiary's fiscal and material needs?

Has social worker requested increased fiscal or material support from representative payee?

What has been the response of representative payee?

Does representative payee ever contact social worker or hospital to ascertain personal needs of beneficiary?

Are there any particular abuses social worker is aware of concerning non-payment of benefits?

G. RELATIONSHIP BETWEEN SOCIAL WORKER AND SOCIAL SECURITY ADMINISTRATION DISTRICT OFFICE

What kind of co-operation has social worker received form SSA District Office?

Is social worker aware of the procedure by which he/she can get permission to see beneficiary's SSA file?

H. ACTION TO CHANGE REPRESENTATIVE PAYEE

Has a com laint ever been filed against current representative payee?

Was complaint ever filed against previous representative payee?

Has a letter been sent to Social Security Administration requesting a change of representative payee?

Date of letter

Action

Has Change of Payee form been sent to SSA?

Date

Action

Have there been any previous attempts to change representative payee?

Date(s)

Action

III. COMMISSION ON THE LEGAL AND CIVIL RIGHTS OF THE DEVELOPMENTALLY DISABLED

A. Does beneficiary wish CODD to represent him/her in action against SSA?

Is he/she willing to sign power of attorney statement

B. Is beneficiary willing to sign privacy release?

Before the

SECRETARY OF HEALTH, EDUCATION AND WELFARE

Washington, D.C. 20201

PETITION OF THE ATTORNEYS GENERAL OF MASSACHUSETTS AND CONNECTICUT TO AMEND AND CHANGE THE RULES GOVERNING REPRESENTATIVE PAYMENTS OF SOCIAL SECURITY AND SUPPLEMENTAL SECURITY INCOME BENEFITS

The Attorneys General of Massachusetts and Connecticut hereby petition the Secretary of Health, Education and Welfare to issue and publish a notice of proposed rulemaking, pursuant to the Administrative Procedure Act, 5 U.S.C. §553, adopting the following changes in HEW regulations, in Title 20 of the Code of Federal Regulations, concerning representative payees.

These proposed regulations deal generally with the selection and supervision of representative payees both for beneficiaries under the Federal Old-Age, Survivors and Disability Insurance program (20 C.F.R. Part 404) and for recipients of Supplemental Security Income (20 C.F.R. Part 416).*

The proposed changes would: (1) clarify standards for the selection of representative payees; (2) insure that notice and opportunity for a hearing are provided before

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*To the extent possible, the changes proposed herein for Part 416 are identical to those listed for Part 404.

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appointment of a representative payee; (3) require all representative payees to submit annual accounting and post surety bonds; and (4) provide remedies for improper activity by a representative payee.

A. Part 404 - Federal Old-Age, Survivors and Disability Insurance.

(1) § 404.905. Add the following sentence at the end of Section 404.905.

> The parties to such initial determination shall include the recipient, his legal representative, and the custodian in fact of the recipient.

(2) § 404.907. Delete the second sentence of Section 404.907 and substitute the following.

> If the initial determination disallows, in whole or in part, the application or request of a party, or if the initial determination is to the effect that a husband, widower, or parent was not receiving the requisite support from an insured individual, or that a reduction, deduction, or adjustment is to be made in benefits or a lump sum, or that a representative payee is to be appointed or substituted by another payee, or that a period of disability established for a party has terminated, the notice of the determination sent to the party shall state the basis for the determination and shall provide an opportunity for an evidentiary hearing before such determination is effectuated.

(3) § 404.1601. Delete Section 404.1601 and substitute the following new section.

> § 404.1601 Payments on behalf of an individual
>
> (a) If the Administration finds, after affording an opportunity for an evidentiary hearing as required in sec. 404.907, that the interest of a beneficiary entitled to payment under title II of the Act would be served thereby, certification of

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payment may be made by the Administration, regardless of the legal competency or incompetency of the beneficiary entitled thereto, either for direct payment to such beneficiary, or for his use and benefit to a relative or some other person as the "representative payee" of the beneficiary. When it appears that an individual who is receiving benefit payments may be incapable of managing such payments in his own interest, the Administration shall, if such individual is age 18 or over and has not been adjudged legally incompetent, continue payments to such individual pending a determination as to his capacity to manage benefit payments and the selection of a representative payee. The Administration shall pay directly to the beneficiary whatever amount of his payments he is able to manage on his own behalf."

(4) § 404.1601. Add the following new subsections (b) and (c) after the newly-designated Section 404,1601(a).

(b) The Administration shall not certify payments to a representative payee unless it finds that a beneficiary, because of mental disability, physical disability or minority, is unable to properly manage or conserve his funds. A finding that a beneficiary is unable to manage or conserve his funds must be supported by evidence including specific findings of fact which show that the beneficiary (1) has been, or almost certainly would be, victimized by designing persons due to his mental or physical disability or minority, or (2) has squandered or dissipated his funds, or almost certainly would do so, due to lack of appreciation of value, or (3) has unnecessarily refused or neglected or almost certainly would unnecessarily refuse or neglect to spend money because of delusional thinking or lack of appreciation of his needs. These findings must be supported by affidavits or sworn testimony which establish actual facts of strong medical presumption that the specific condition of the beneficiary would necessarily impair judgement or ability to manage funds.

(c) Institutionalization of a beneficiary shall raise no presumption or inference that the beneficiary is unable to properly manage funds.

(5) § 404.1601.1. Add the following new Section 404.1601.1.

§ 404.1601.1 Selection and supervision of representative payees.

(a) The Administration shall consider the views of any responsible party in the selection of a suitable representative payee. In proceedings in state courts for the appointment of fiduciaries for recipients of benefits under this Act, the Administration may appear and recommend to the court the person or legal entity best suited to act as fiduciary with respect to such benefits.

(b) No person shall be appointed as representative payee for more beneficiaries than he can reasonably be expected to serve properly.

(c) The Administration shall not certify payments to the superintendent of any hospital, nursing home, or other institution unless the superintendent has first executed an agreement in accord with § 416.635 and furnished security in accord with § 416.690.

(d) In any case where the representative payee has failed to render a satisfactory account, has misapplied or mismanaged funds, or has accumulated funds without paying for current needs of the beneficiary, the Administration shall take effective action to protect the interests of the beneficiary. In such cases the Administration's authority includes but is not limited to:

(1) Appearing in state court to petition for the appointment or removal of a fiduciary, to petition the court to cite a fiduciary to account, and to made proper presentations relating to these matters.
(2) Suspension of part or all of the payments to a representative payee and recognition of a substitute payee.
(3) Requiring accountings at any time from a payee and requiring a payee to furnish additional security.
(4) Taking appropriate legal action to recover funds improperly disbursed, including execution on bonds.
(5) Requiring investments.
(6) Taking other legal action necessary to secure proper administration of the beneficiary's estate.

(7) Referring evidence of fraud or embezzlement to the U.S. Attorney.

(6) § 404.1604.5. Add the following new Section 404.1604.5.

§ 404.1604.5 Representative payment to superintendent of hospital, nursing home, or other institution.

(a) The Administration may, where appropriate, appoint the superintendent of a hospital, nursing home, or other institution as representative payee for part or all of a beneficiary's benefits, provided the superintendent furnishes security and executes any agreement required under paragraph (b) of this section.

(b) The Administration may require a representative payee under paragraph (a) of this section to agree in writing that the beneficiary's benefits shall be applied to:

(1) a monthly amount determined by the Administration to be needed for the beneficiary's personal use.

(2) an amount agreed on to be accumulated to provide for the beneficiary's rehabilitation and adjustment upon release from the institution.

(3) so much of the benefits as remain, but not exceeding the amount determined by the Administration to be the proper charge as fixed by stacute or administrative regulation, for the beneficiary's care and maintenance.

(c) If a superintendent refuses to agree, as required under paragraph (b) of this section, or fails to comply with any such agreement which has been made, the Administration shall suspend payment to the superintendent and seek a substitute payee. If no suitable substitute payee can be found, the Administration shall either resume payments to the beneficiary or bring a petition in the appropriate state court for the appointment of a fiduciary.

(7) § 404.1606. Add the following new subsection (d) to Section 404.1606.

> (d) Where the Administration finds that the representative payee of an institutionalized beneficiary has failed to furnish funds for the beneficiary's comfort and personal needs as well as for the costs of rehabilitation and maintenance (including customary charges made by the institution, where applicable), or has otherwise misapplied funds or accumulated funds without paying for current needs, the Administration shall find a suitable substitute payee and take other effective action, as specified in 416.603, to protect the interests of the beneficiary.

(8) § 404.1609. Delete Section 404.1609 and substitute the following new section.

> (a) A representative payee shall submit an annual written report, in such form and at such times as the Administration may require, accounting for the payments certified to him on behalf of the beneficiary, unless such payee is a court-appointed fiduciary and, as such, is required to make an annual accounting to the court, in which case a true copy of each such account filed with the court may be submitted in lieu of the accounting form prescribed by the Administration. If any representative payee fails to submit the annual report when it is due or otherwise fails to account within a reasonable time after he is requested to do so, no further payments shall be certified to him on behalf of the beneficiary and a substitute payee shall be designated, unless, for good cause shown, the default of the representative payee is excused by the Administration and the required accounting is thereafter submitted.
> (b) If the person having custody or control of the beneficiary is different from the representative payee, the Administration shall make the accounting forms of the representative payee available for inspection by the person having custody or control of the beneficiary.

(c) The Administration shall require each representative payee to furnish a surety bond in an amount equal to the value of the personal estate derived from benefits under this title plus the anticipated net income from benefits received during the ensuing accounting period. Such bond shall run to the Administration for the use and benefit of the beneficiary. When it is not practical or feasible to require a corporate surety bond, the Administration shall accept a bond with personal sureties of sufficient worth to protect the interest of the beneficiary. In cases where the representative payee neglects or refuses to furnish a surety bond in the amount requested by the Administration, the Administration may decline to either continue or begin payments to such representative payee and may take appropriate court action.
(d) The Administration may require an agreement in lieu of a surety bond sufficient to protect the legal interests of the beneficiary.

B. Part 416 - Supplemental Security Income for the Aged, Blind and Disabled.

(1) § 416.1403. Delete Subsection 416.1403(a)(3) and substitute the following new subsection.

(3) A determination regarding to whom representative payment shall be made or continue to be made; except that the parties (see § 416.1414) to such initial determination shall be restricted to the recipient, his legal representative and the person having custody in fact of the recipient; and may include an essential person as defined in § 416.243 who has shown in writing that he may be prejudiced by such determination.

(2) § 416.1404. Delete Subsection 416.1404(c) and substitute the following new subsection.

(c) If the initial determination is that a party's eligibility for benefits has ended or that benefits are to be suspended or that a reduction or adjustment is to be made in the amount of benefits or that a representative

payee is to be appointed or substituted by another payee, the notice of such determination shall state the basis for such determination and shall provide notice and an opportunity for an evidentiary hearing before such determination is effectuated, except as otherwise provided in subpart m of this part.

(3) § 416.601. Delete Subsection 416.601(a)(1) and substitute the following new subsection.

(a) Payments to recipient or representative payee. (1) If the Administration finds, after affording an opportunity for an evidentiary hearing as required under sec. 416.1404, that the interest of a recipient of payments under title XVI of the Act would be served thereby, certification of part or all of the payments may be made by the Administration, regardless of the legal competency or incompetency of the recipient eligible thereto, either for direct payment to such recipient, or for his use and benefit to a relative or some other person (including an appropriate public or private agency) selected by the Administration as the "representative payee" of the recipient. The Administration shall pay directly to the recipient whatever amount of his payments he is able to manage on his own behalf.

(4) § 416.601. Renumber the present subsections (2) and (3) of Section 416.601(a), as subsections (4) and (5), and add the following new subsections (2) and (3).

(2) The Administration shall not certify payments to a representative payee unless it finds that a recipient, because of mental disability, physical disability or minority, is unable to properly manage or conserve his funds. A finding that a recipient is unable to manage or conserve his funds must be supported by evidence, including specific findings of fact which show that the recipient (i) has been, or almost certainly would be,

victimized by designing persons due to his mental or physical disability or minority, or (ii) has squandered or dissipated his funds, or almost certainly would do so, due to lack of appreciation of value, or (iii) has unnecessarily refused or neglected, or almost certainly would unnecessarily refuse or neglect to spend money because of delusional thinking or lack of appreciation of his needs. These findings must be supported by affidavits or sworn testimony which establish actual facts of strong medical presumption that the specific condition of the recipient would necessarily impair judgment or ability to manage funds.
(3) Institutionalization of a recipient shall raise no presumption or inference that the recipient is unable to properly manage funds.

(5) § 416.603. Add the following new Section 416.603.

§ 416.603. Selection and supervision of representative payees.
(a) The Administration shall consider the views of any responsible party in the selection of a suitable representative payee. In proceedings in state courts for the appointment of fiduciaries for recipients of benefits under title XVI of the Act, the Administration may appear and recommend to the court the person or legal entity best suited to act as fiduciary with respect to such benefits.
(b) No person shall be appointed as representative payee for more recipients than he can reasonably be expected to serve properly.
(c) The Administration shall not certify payments to the superintendent of any hospital, nursing home, or other institution unless the superintendent has first executed an agreement in accord with § 416.635 and furnished security in accord with § 416.690.
(d) In any case where the representative payee has failed to render a satisfactory account, has misapplied or mismanaged funds, or has accumulated funds without paying for

current needs of the recipient, the Administration shall take effective action to protect the interests of the recipient. In such cases, the Administration's authority includes but is not limited to:

(1) Appearing in state court to petition for the appointment or removal of a fiduciary, to petition the court to cite a fiduciary to account, and to make proper presentations relating to these matters.
(2) Suspending part or all of the payments to a representative payee and designating a substitute payee.
(3) Requiring accountings at any time from a payee, and requiring a payee to furnish additional security.
(4) Taking appropriate legal action to recover funds improperly disbursed, including execution on bonds.
(5) Requiring investments.
(6) Taking other legal action necessary to secure proper administration of the recipient's estate.
(7) Referring evidence of fraud or embezzlement to the U.S. Attorney.

(6) § 416.602. Add the following new Section 416.

602.

§416.602 Representative payment to superintendent of hospital, nursing home, or other institution.

(a) The Administration may, where appropriate, appoint the superintendent of a hospital, nursing home, or other institution as representative payee for part or all of a recipient's benefits, provided the superintendent furnishes security and executes any agreement required under paragraph (b) of this section.
(b) The Administration may require a representative payee under paragraph (a) of this section to agree in writing that the recipient's benefits shall be applied to:

(1) a monthly amount determined by the Administration to be needed for the recipient's personal use.

(2) an amount agreed on to be accumulated to provide for the recipient's rehabilitation and adjustment upon release from the institution.

(3) so much of the benefits as remain, but not exceeding the amount determined by the Administration to be the proper charge as fixed by statute or administrative regulation, for the recipient's care and maintenance.

(c) If a superintendent refuses to agree, as required under paragraph (b) of this section, or fails to comply with any such agreement which has been made, the Administration shall suspend payment to the superintendent and seek a substitute payee. If no suitable substitute payee can be found, the Administration shall either resume payments to the recipient or bring a petition in the appropriate state court for the appointment of a fiduciary.

(7) § 416.640. Add the following new subsection (d) to Section 416.640.

(d) Where the Administration finds that the representative payee of an institutionalized recipient has failed to furnish funds for the recipient's comforts and personal needs as well as for the costs of rehabilitation and maintenance (including customary charges made by the institution, where applicable), or has otherwise misapplied funds or accumulated funds without paying for current needs, the Administration shall find a suitable substitute payee and take other effective action, as specified in 416.603, to protect the interests of the recipient.

(8) § 416.690. Delete Section 416.690 and substitute the following new section.

(a) A representative payee shall submit an annual written report, in such form and at such time as the Administration may require, accounting for the payments certified to him on behalf of the recipient, unless such payee is a court-appointed fiduciary and, as such, is required to make an annual accounting to the court, in which case a true copy of each such account filed with the court may be submitted

in lieu of the accounting form prescribed by the Administration. If any representative payee fails to submit the annual report when it is due or otherwise fails to account within a reasonable time after he is requested to do so, no further payments shall be certified to him on behalf of the recipient and a substitute payee shall be designated, unless, for good cause shown, the default of the representative payee is excused by the Administration and the required accounting is thereafter submitted.

(b) If the person having custody or control of the recipient is different from the representative payee, the Administration shall make the accounting forms of the representative payee available for inspection by the person having custody or control of the recipient.

(c) The Administration shall require each representative payee to furnish a surety bond in an amount equal to the value of the personal estate derived from benefits under this title plus the anticipated net income from benefits received during the ensuing accounting period. Such bond shall run to the Administration for the use and benefit of the recipient. When it is not practical or feasible to require a corporate surety bond, the Administration shall accept a bond with personal sureties of sufficient worth to protect the interest of the recipient. In cases where the representative payee neglects or refuses to furnish a surety bond in the amount requested by the Administration, the Administration may decline to either continue or begin payments to such representative payee and may take appropriate court action.

(d) The Administration may require an agreement in lieu of a surety bond sufficient to protect the legal interests of the recipient.

Dated: March 15, 1976

Respectfully submitted,

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Before The

SECRETARY OF HEALTH, EDUCATION AND WELFARE

Washington, D.C. 20201

PETITION OF THE ATTORNEYS GENERAL OF MASSACHUSETTS AND CONNECTICUT TO AMEND AND CHANGE THE RULES GOVERNING REPRESENTATIVE PAYMENT OF SOCIAL SECURITY AND SUPPLEMENTAL SECURITY INCOME BENEFITS	)

MEMORANDUM SUPPORTING THE PETITION

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I. INTEREST OF THE PETITIONER

A. Individual Cases

At the present time, Petitioners have more than 100 documented cases of individuals whose Social Security or Supplemental Security Income (SSI) benefits have been improperly diverted to third persons, through use of the HEW "representative payee" device. The actual number of Massachusetts citizens similarly afflicted must be well over one thousand. Although accurate figures are unavailable from HEW, 20,000 is a conservative estimate of the current number of representative payees in Massachusetts.

Carolyn P_____*, for example, is a severely retarded adult child, cared for at a state institution, who does not understand the value of money. Although she is now and has been eligible for Social Security Administration (SSA) benefits of $177.50 per month and although her mother and father have been designated as representative payees, Carolyn's balance in the treasurer's office is $.00. Her parents have provided no money since May 21, 1971. From 1969 to 1971, they provided $40.

Edward G_____ is a profoundly retarded adult

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*Throughout, only the first initial of surnames will be used, to protect the privacy of the individuals involved.

child, cared for at a state institution, who does not understand the value of money. Edward is now and has been eligible for SSA benefits of $160.80 per month and his brother has been appointed representative payee (having taken over for Edward's father, who died in 1972). Until recently, no money had been provided for Edward since 1970. Upon the request of a social worker, Edward's brother sent $85 in November, 1975.

Carol Ann V_____ is a severely disabled adult child, cared for at a state institution, who does not understand the value of money. She is now and has been eligible to receive SSA benefits of $74.70 per month and her father has been appointed as representative payee. During all of 1975, her father sent Carol Ann $10.

Ross S_____ is a profoundly retarded adult child, cared for at a state institution, who does not understand the value of money. He is now and has been eligible to receive SSA benefits of $192.50 per month. His mother has been appointed his representative payee, but Ross has a $.00 balance with the treasurer's office and his mother has provided no money since 1973.

Donald S_____ is a severely retarded adult child, cared for at a state institution, who does not understand the value of money. He is now and has been eligible to receive SSA benefits of $184.50 per month. His mother, as representative

payee, has sent no money for Donald's care since January, 1973. She does, however, send small packages of clothing and candy at Christmas and on Donald's birthday.

B. The Attorneys General

The Attorneys General appear herein: (1) on their own behalf, as they are chief law officers of their States; (2) on behalf of the States, which have been required improperly to provide support of patients in state institutions; and (3) on behalf of the States, as parens patriae, particularly for those Massachusetts and Connecticut citizens who currently receive their Social Security and SSI payments only through representative payees.

First, the abuses which have been allowed by the current SSA system raise a variety of legal questions, both state and federal, which make this an appropriate subject of concern for an Attorney General. Indeed, a major purpose of this Petition is to ease the burden on both the Attorneys General and counsel for HEW, by providing an administrative solution to an area which is the subject of litigation with increasing frequency. The present regulations seem to provide for a taking of the SSA recipients' property without due process of law, in that: (1) a representative payee may be selected without prior notice or opportunity for a hearing for the recipient; (2) the regulations contain no clear

standards for determining an individual's ability to manage money; and (3) the supervision by SSA of what happens to the money is totally ineffective.

Second, the States have a twofold proprietary interest in this matter. On the one hand, the SSI program is supported in large part by funds which are appropriated by the Massachusetts and Connecticut Legislatures. On the other hand, several thousand Social Security and SSI recipients are residents of public institutions operated by the States. The funds of those residents often are mismanaged or misappropriated by their representative payees, so that the residents' basic needs either are not met or are paid for by Massachusetts and Connecticut from state funds--even though SSA has paid funds to meet these precise needs. The Attorneys General are properly representing their States' interests in seeking to improve SSA's management of representative payees.

Third, the Attorneys General are appearing herein as parens patriae, to protect the interests of all Massachusetts and Connecticut citizens in the proper administration of this program. Of particular concern, however, are those citizens who are being denied the benefits to which they are entitled and thus are forced to rely, in many cases, on the largess of other institutionalized persons. The Attorneys General bear an affirmative obligation to take such action as may be necessary to protect these people.

II. DEFICIENCIES OF THE PRESENT REGULATIONS

The present regulations (20 C.F.R. §404.1601 et seq. and §416.601 et seq.), as administered and interpreted by the SSA, allow a variety of problems. These problems fall into three general areas: selection and appointment of payees; supervision of payees; and enforcement of the regulations.

A. Selection and Appointment

Pursuant to 20 C.F.R. §§404.1601 and 416.601, the SSA may appoint a representative payee whenever it believes the individual's interests would be served thereby. The regulations offer no guidelines for determining how or why a person should be found unable to manage his own funds.

In practice, the SSA requires only an application from the person seeking to be appointed as representative payee and a pink slip, filled out by a licensed physician, containing the bare allegation that the recipient is unable to manage his own benefits. If these documents are both in the file and no protest is made, no further questions are asked and the payee is appointed. The SSA does not require a personal interview with the person seeking representative payee status. The entire matter can be conducted over the telephone.

Furthermore, the regulations appear to ignore the rudiments of due process. 20 C.F.R. §§404.905(n) and

416.1403(a)(2) provide that a decision to appoint a representative payee shall be treated as an "initial determination". Accordingly, recipients must receive notice that a decision has been made, but there is no provision for a hearing before payments start going to the payee. 20 C.F.R. §§404.907 and 416.1404.

As a result of these rules and procedures, payees are appointed for a number of people who actually are able to handle their own money, without the SSA ever having gathered any direct evidence on this question or having consulted directly with the beneficiary. People who know the value of money and who know how to manage it are deprived of the right to control their own funds, without any fair determination that they are unable to do so.

Courts have long recognized that welfare and Social Security benefits are not merely privileges, but statutory entitlements and therefore properly within the protection of the due process clause. E.g., Goldberg v. Kelly, 397 U.S. 254 (1970). Furthermore, the appointment of a fiduciary with the power to control a person's assets constitutes an infringement of property rights which must comply with the due process clause. Thus, federal courts have overturned state statutes in McAuliffe v. Carlson, 377 F. Supp. 896 (D. Conn. 1974) and 386 F. Supp. 1245 (D. Conn. 1975),

Vecchione v. Wohlgemuth, 377 F. Supp. 1361 (E.D. Pa. 1974), and Dale v. Hahn, 486 F.2d 76 (2d Cir. 1973), because the statutes involved in those cases allowed for curtailment of the petitioners' control over their property without sufficient concern for due process of law. Each of these cases involved state procedures by which guardians seized control over the assets of mental patients, without sufficient notice or opportunity for a hearing.

Guardianship laws are not exempted from the requirements of due process by the fact that they purport to provide for the "best interests" of the ward. When property rights are curtailed, due process requirements must be met regardless of the motivation. Due process must be afforded whenever a person is deprived of the "use or possession" of his property, even if he is not deprived of full title. See, Dale v. Hahn, 486 F.2d 76 (2d Cir. 1973). See, also, Fuentes v. Shevin, 407 U.S. 67 (1972).

The regulations in question establish a form of administrative guardianship. The SSA makes payments directly to the representative payee, and considers this to be "final settlement" of the beneficiary's claim for benefits. As noted above, the rules make no provision for a hearing prior to the appointment of a payee. Although notice is required, in many cases the recipient never receives any formal notice

before his benefits are diverted. Furthermore, the SSA does not have any ascertainable standards which are used to determine whether a payee should be appointed. The decision to appoint a representative payee generally is based on no factual findings but only the allegation in the physician's "pink slip", unsupported by any evidence that the beneficiary is unable to manage his own benefits. The absence of adequate notice and opportunity for a prior hearing, the lack of ascertainable standards, and the fact that appointments are not based on factual findings, all seem to constitute clear violations of the due process clause.

The proposed rule changes, if adopted, would cure these constitutional defects. These changes would compel the SSA to take a closer look at the need for a representative payee in each case, requiring that each appointment be based on a specific factual finding of fiscal incompetence. The requirement of such a finding would provide the beneficiary with a fairer chance to contest the determination that a payee should be appointed and would eliminate the consideration of extraneous and irrelevant factors, such as institutionalization or mild mental disability.

It must be noted, finally, that the present regulations are particularly harmful in view of the fact that many moderately retarded people know how to handle funds but are

not aggressive about protecting their own property rights. These people will often accept a decision to appoint a representative payee, simply because they feel powerless or afraid to argue with the SSA or with the person who applied to be a payee, and not because they are unable to handle money.

B. Supervision of Payees

Guardianship over property is distinguishable from outright taking only by the fact that the fiduciary has a legal obligation to act in the ward's best interest. If a guardian has unfettered ability to spend the ward's assets in any manner, the appointment of the guardian would become, in effect, an outright taking. The guardian's legal accountability is thus a necessary aspect of guardianship.

The general and traditional method of holding the guardian or fiduciary accountable is by requiring both itemized periodic accounts and a surety bond to insure that the ward's funds will not be lost or wasted. All state guardianship laws contain these safeguards. See, e.g., Massachusetts General Laws c. 206, §1. The Veterans Administration also requires bonding of fiduciaries. 38 C.F.R. §13.105. The SSA is unique, in that it requires neither periodic accountings nor bonding.

After a representative payee has been appointed, the

SSA purports to require the payee to file forms periodically explaining the use of the funds. In actual practice, these forms are required only intermittently, if at all. Even when they are filed, the forms do not require detailed accountings with receipts, but only general descriptions of how the money was spent. In general, supervision of the payee is lax or nonexistent. Only when a responsible third party makes a complaint will the SSA look into a case, and even that investigation generally is limited to a request for an updated accounting form from the payee. This causes severe problems in several different contexts:

(1) Institutional payees. Where the representative payee is an institution in which the recipient resides or has resided, lax supervision invites various forms of abuse. Institutional payees have been guilty of commingling funds of various recipients and keeping insufficient records of how the money is spent. They have used control of a recipient's funds as a means of gaining greater control over the recipient's behavior (i.e., punishing him by withholding his money, or using his money in connection with programs of behavioral modification). In some cases, institutuional payees have continued to hold funds or been slow to pay them over after the recipient has left the institution. In other cases, institutions have failed to set aside any funds for the recipient's rehabilitation or eventual release from the institution.

In this region, the SSA has attempted to remedy these problems by conducting "on-site reviews" at the various state institutions. These reviews generally have concluded that no serious problem exists. They have not been an effective deterrent to abuse.

These problems could be substantially remedied by authorizing the SSA to require an agreement from the institutional payee that the money will be held and spent according to a certain plan. Depending on the particular needs of each recipient, certain amounts should be set aside for rehabilitation or deinstitutionalization, with any remainder applied to care and maintenance charges. In its annual accounting, the institution would be required to show compliance with this agreement. Refusal to execute an agreement or failure to comply with it would disqualify the institution as a payee and necessitate the appointment of a substitute payee.

(2) Outside payee for the institutionalized recipient. When a recipient of benefits has been institutionalized, the SSA generally appoints someone outside the institution as a payee. This is intended to preserve contact between the institutionalized recipient and the outside world.

In fact, under current methods of supervision, this form of payment is rife with several types of abuse. Almost every institution where Social Security beneficiaries reside has cases in which outside representative payees regularly collect benefits without ever providing any money for the

institutionalized beneficiary's use and without providing for his needs in any other way. In some cases, representative payees freely admit using social security benefits paid to them on behalf of an institutionalized recipient for things such as land payments, airline tickets, etc. In numerous cases, appointed payees have taken up residence in places as far away as Florida and continued collecting benefits on behalf of institutionalized New England recipients. In many more cases, outside payees make token contributions of clothing, small amounts of spending cash, or candy and gifts, but do not provide anything near the full value of the benefits. In these cases the balance of the benefits is either accumulated, misapplied, or unaccounted for.

Poor federal supervision of outside payees has other consequences more pernicious than simple misuse of funds. State institutions are generally very inefficient at collecting care and maintenance charges from family members or payees. For some residents of state institutions (who have spent more than five years in a state school), no care and maintenance charge is ever assessed. Thus, a large number of outside payees enjoy a substantial windfall. The payees collect the benefit checks, but the state cares for the recipient. This situation actually encourages some payees to oppose efforts of social workers and mental health workers to deinstitutionalize the recipients. Family member payees occasionally obstruct efforts

to move recipients from institutions into community residences for no other reason than that they would lose the use of the recipient's benefit checks.

The current regulations give the representative payee broad discretion as to how the money should be spent, and this effecitvely gives the payee the decision as to what sort of living arrangement the recipient shall have. Current methods of supervision allow the payee to spend the recipient's benefits for his own use, or accumulate the benefits with the intention of gaining full title to them when the recipient dies. This general situation gives the payee a strong economic incentive for keeping the cost of the recipient's care and maintenance to an absolute minimum by seeking the cheapest possible accomodation, rather than the best one. The quality of care is too often sacrificed.

All of these problems with outside payees for institutionalized recipients could be effectively remedied in several ways. First, failure of an outside payee to pay for care and maintenance and to provide funds for rehabilitation and deinstitutionalization should be grounds for automatic removal of the payee. Second, the person having actual custody of the recipient should be given a right of access to the accounting forms filed by the payee. In many cases, the employees of the hospital, school, or nursing home where the payee resides

are the only persons who are able to detect abuse by an outside payee or take any action to correct it. As the regulations are presently drawn, these people have experienced a great deal of difficulty obtaining funds from deliquent payees or getting the SSA to take any action when it is needed. The regulations should be redrafted to give the actual custodian easy access to the accountings, and standing to object to them and to petition for the appointment of a new payee.

C. Enforcement of the Regulations

(1) Security. As noted above, bonding is the general and traditional means of protecting the property of the ward. Nevertheless, the existing regulations do not authorize the SSA to require any form of security for payments to representative payees. The regulations state that payment to a representative payee is to be considered the same as payment to the recipient. They make no provision for recertification of payments when a representative payee is shown to have misapplied or stolen the funds. Thus, negligent federal supervision can result in the recipient suffering a total loss of the use of his benefits. If the representative payee were required to provide a surety bond, this could not happen. Stolen or misused funds could easily be recovered.

Authorization to require security would not only protect the payments against misuse but would also provide the SSA with a means of enforcing the other obligations of the payee. If, for example, a payee refused or failed to file a proper accounting, or disappeared, or went bankrupt, or died impecunious, the SSA could execute on the bond, recover the funds, and find a new payee.

The SSA should require a bond equal to the value of the accumulated estate derived from Social Security or Supplemental Security Income benefits (that part of the total payments not accounted for with receipts) plus the total amount of payments for the ensuing accounting period. The bond would secure the actual payments plus the satisfactory fulfillment of all the payee's obligations specified in the regulations.

(2) Enforcement of regulations. Another needed change is a provision authorizing the SSA to make appearances in state courts for various purposes, including filing petitions for the appointment or removal of guardians, the citing of guardians to account, and the taking of other legal action to recover funds improperly handled. This authority would provide the SSA with a means of seeking legal enforcement short of suspension of payments to a delinquent payee. The SSA could invoke the force of law when necessary to protect

the beneficiary's interest. For example, where a large lump sum payment is involved, the SSA could first petition for the appointment of a conservator, instead of paying the money directly to a non-court appointed payee who could not subsequently be compelled to account or to return the money.

This ability to invoke judicial authority is essential for the smooth administration of the SSA's conservatorship program. Without this ability, the SSA is powerless to correct past abuses or to take effective preventative measures when they are needed.

III. THE PROPOSED REGULATIONS

The proposed new and amended regulations are specified in the Petition which accompanies this memorandum. They are designed to alleviate all the problems discussed herein by strengthening the SSA's standards with respect to supervision and selection of representative payees.

The Petition contains two sets of eight recommendations: A(1)-(8), which deal with Old-Age Survivors and Disability Insurance benefits (20 C.F.R. Part 404); and B(1)-(8), which deal with Supplemental Security Income benefits (20 C.F.R. Part 416). The recommended changes parallel each other, so, for example, the purposes of the changes in A(3) are identical to those in B(3), but for two different programs. Following is an explanation for each of the eight proposed changes.

(1) §§404.905(n) and 416.1403(a)(3)

These would afford the recipient or beneficiary, as

well as his legal representative and any custodian in fact, the right to participate fully in determinations as to whether a representative payee should be appointed. Institutional custodians could now contest payment to representative payees outside of the institution in those cases in which the recipient is so incompetent as to be unable to contest the initial determination and there is no one else to represent him other than the agents and employees of the institution.

(2) §§404.907 and 416.1404(c).

The language added to these sections would add appointment of a representative payee to the list of determinations requiring the SSA to give notice of the determination and the reasons therefor. In addition, to avoid further constitutional challenges, such as have been plaguing the SSA recently, opportunity for a hearing prior to such determinations also is provided.

(3) §§404.1601(a) and 416.601(a)(1).

(4) §§404.1601(b),(c) and 416.601(a)(2),(3).

First, these changes will require the Administration to base an initial determination that representative payment is needed on specific facts and specific standards. This will give the recipient a fairer chance to contest the finding that he is unable to manage his own money and allow for better decision-making, due to application of specific criteria. This would tend to lessen the number of unnecessary appointments and the SSA work associated therewith. Second, these changes will

permit the SSA to make partial direct payment to a recipient where it finds that the recipient is able to handle some, but not all of his benefits.

(5) §§404.1601.1 and 416.603.

These new sections would provide specific guidelines for SSA's role in selecting and supervising representative payees, specifically listing some of the legal tools available to carry out this obligation.

(6) §§404.1604.5 and 416.602.

These also are new sections, specifically aimed at controlling possible abuses by the superintendents of institutions which have been appointed as representative payees. They will assure that superintendents do not misappropriate or confiscate recipients' funds, nor use control of these funds as a disciplinary or behavioral modification tool.

(7) §§404.1606(d) and 416.640(d).

By adding these new subsections, the SSA would be provided the ability to take such action as may be necessary, including replacement, when a representative payee fails to properly apply SSA funds.

(8) §§404.1609 and 416.690.

These changes make the accounting requirements mandatory, rather than discretionary with the Administration, and allow the custodian in fact to have access to the accounting

forms. They also adopt the policy of the Veterans Administration of requiring security for payments to representative payees. This assures protection for the beneficiary at relatively minimal expense and provides an easy and effective remedy when a representative payee defaults on any of his obligations.

IV. CONCLUSION.

For all the foregoing reasons, Petitioners request that the Secretary issue a notice of proposed rulemaking on the regulations suggested herein and hold hearings thereon.

DATED: March 15, 1976

Respectfully submitted,

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Appendix D

94TH CONGRESS
2D SESSION

H. R. 13195

IN THE HOUSE OF REPRESENTATIVES

APRIL 13, 1976

Mr. BINGHAM introduced the following bill; which was referred to the Committee on Ways and Means

A BILL

To amend title XVI of the Social Security Act to insure that the rights of aged and disabled recipients to their benefits are granted sufficient procedural protection by the Social Security Administration.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. (a) Section 1383 (a) (2) of the Social Security Act is amended to read as follows:

"(2) (A) Payments of the benefit of any individual may be made to any such individual or to his eligible spouse (if any) or partly to each; or, if the Secretary finds that a recipient of benefits under this subchapter is unable to manage funds because of mental or physical incapacity or minority,

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all or part of the payments, in an amount necessary to protect the interest of the recipient, may be paid to any other person (including an appropriate public or private agency) who is interested in or concerned with the welfare of such individual or spouse.".

(b) Section 405 (j) of the Social Security Act is amended to read as follows:

"(j) (1) If the Secretary finds that an applicant is unable to properly manage benefits because of mental or physical disability or minority, certification of payment of part or all of the benefits may be made, regardless of the legal competence or incompetence of the individual entitled thereto, either for direct payment to such applicant, or for his use and benefit to a relative or some other person.".

SEC. 2. Section 1383 (c) (1) of the Social Security Act is amended to read as follows:

"(c) (1) The Secretary shall provide reasonable notice and opportunity for a hearing to any individual who is or claims to be an eligible individual or eligible spouse and is in disagreement with any determination under this subchapter with respect to eligibility of such individual for benefits, or the amount of such individual's benefits, or the ability of such individual to receive and manage his own benefits, if such individual requests a hearing on the matter in dis-

agreement within thirty days after notice of such determination is received.".

SEC. 3. (a) Section 1383 (a) (2), as amended, is further amended by adding the following subparts (B) and (C):

"(B) The Secretary shall, when necessary, take appropriate legal action to protect the interests of individuals whose benefits are paid to representative payees under part A of this section. Whenever it appears that court appointment of a fiduciary is necessary for the proper management and protection of an individual's benefits, or that a previously appointed fiduciary has mismanaged or misapplied an individual's benefits or failed to render a proper accounting, the Secretary may, by his duly authorized attorney, appear in the court having original, concurrent, or appellate jurisdiction over said cause and make a proper presentation of such matters. The Secretary may petition for the appointment or removal of a fiduciary, and for the citing of a fiduciary to account. The Secretary may, in his discretion, require all representative payees to make periodic accountings and to furnish bonds or sureties sufficient to protect the interest of the beneficiary. The Secretary may take legal action to recover any benefits improperly disbursed or accumulated by a representative payee.

"(C) Authority is hereby granted for the payment of any court or other expenses incident to any investigation or court proceeding for the appointment or removal of a fiduciary who receives payment under this section, or in connection with any other court proceeding hereby authorized.".

(b) Section 405 of the Social Security Act, as amended, is further amended by adding the following subsection (j) (2);

"(j) (2) The Secretary is authorized to take effective legal action to protect the interest of any beneficiary whose benefits are paid to a representative payee under subsection (j) (1) of this section. The Secretary may, where necessary to protect an individual's estate derived from benefits under this title, appear in the court of proper jurisdiction and petition for the appointment or removal of a fiduciary, or for the citing of a fiduciary to account. The Secretary may, in his discretion, require any representative payee to account periodically and to furnish bonds or sureties sufficient to protect the interest of the beneficiary. The Secretary may, pending investigation of mismanagement or misuse, suspend payments to any representative payee and accumulate them on behalf of the beneficiary or pay them temporarily to the person hav-

ing custody of the beneficiary. The Secretary may take legal action to recover benefits improperly disbursed or accumulated, and may incur costs in connection with any court proceeding authorized by this subsection.".

Appendix E

MENTAL HEALTH PERSONAL FUNDS BILL: REDRAFT OF S.478

AN ACT TO PROVIDE ACCOUNTABILITY FOR THE PERSONAL FUNDS OF RESIDENTS IN MENTAL HEALTH FACILITIES.

Be it enacted by the Senate and House of Representatives in General Court assembled and by the authority of the same as follows:

Section 1. Section 1 of chapter 123 of the General Laws as most recently amended by sections 1 and 1A of chapter 760 of the Acts of 1971 is hereby further amended by inserting after the paragraph defining "superintendent" the following paragraphs: ---

"Dependent funds", those funds which a resident is unable to manage or spend himself as determined by the periodic review.

"Fiduciary", any corporation, bank, trust company, or individual who serves in any of the following capacities for another person: (1) guardian, (2) conservator, (3) trustee, (4) a representative payee as determined by any federal agency, or (5) a person who receives governmental or private pensions or payments on behalf of another.

"Independent funds", those funds which a resident is able to manage or spend himself as determined by the periodic review.

"Personal funds", all cash, checks, negotiable instruments, or any other income or liquid personal property held by residents in any facility, all payments to said residents granted pursuant to any Social Security Administration program, and all other governmental or private pensions and payments, that are intended to satisfy the residents' personal needs.

Section 2. Section 4 of chapter 123 of the General Laws as most

recently amended by section 1 of chapter 845 of the Acts of 1974 is hereby further amended by inserting after "facilities" in the first paragraph the following:

(4) unless a guardian or conservator has been appointed, evaluation of each resident to determine how much of his personal funds shall be designated as dependent funds and how much as independent funds, and the formulation and maintenance of a financial plan for the use of dependent funds.

Section 3. Section 27 of chapter 123 of the General Laws as most recently amended by chapter 299 of the Acts of 1974 is hereby amended by inserting after "funds belonging to such persons" in the first paragraph the following:

except that independent funds shall only be deposited with the consent of the resident.

Section 4. Section 27 of chapter 123 of the General Laws is hereby further amended by inserting after paragraph (c) the following paragraphs: ---

(d) The department shall require all fiduciaries of persons residing in department facilities to register with the superintendent on a form supplied by the department If a fiduciary fails to register in such a manner, the department shall be authorized to petition for the removal of the fiduciary and the appointment of a substitute.

(e) The department shall establish standard procedures to provide controls and accountability for the personal funds of residents in department facilities for whom said funds are managed by a guardian,

conservator, or "representative payee" as appointed by any federal agency, other than the superintendent. Such procedures shall require an annual report by the guardian, conservator, or "representative payee" to the department on a form supplied by the department indicating the manner in which personal funds were managed by the fiduciary during the report period under threat of the penalty for perjury as provided for in sections 1 and 1A of chapter 268 of the General Laws. If a guardian, conservator, or "representative payee" fails to submit an annual report to the department, the department shall be authorized to petition for the removal of the fiduciary and the appointment of a substitute.

(f) A fiduciary who embezzles or fraudulently converts or appropriates money, goods, or property held or possessed by him for the use and benefit of the resident shall be subject to penalties prescribed in Section 57 of chapter 266 of the General Laws and shall make full restitution of said money, goods, or property.

NURSING HOME PERSONAL FUNDS BILL: REDRAFT OF S. 480

AN ACT TO ESTABLISH PROCEDURES TO PROVIDE ACCOUNTABILITY FOR THE PERSONAL FUNDS OF RESIDENTS IN LONG TERM CARE FACILITIES.

Be it enacted by the Senate and House of Representatives in General Court assembled and by the authority of the same, as follows:

Section 1. Section 2 of chapter 118E of the General Laws as appearing in section 1 of chapter 800 of the Acts of 1969, is hereby amended by inserting after paragraph (h) the following paragraphs: ---

(i) "Fiduciary", any corporation, bank, trust company, or individual who serves in any of the following capacities for another person: (1) guardian, (2) conservator, (3) trustee, (4) a representative payee as determined by any federal agency, or (5) a person who receives governmental or private pensions or payments on behalf of another.

(j) "Personal funds", all cash, checks, negotiable instruments, or any other income or liquid personal property held by residents of any nursing home, rest home, or convalescent home, all payments to said residents granted pursuant to any Social Security Administration program, and all other governmental or private pensions or payments that are intended to satisfy the residents' personal needs.

Section 2. Chapter 118E of the General Laws, as appearing in section 1 of chapter 800 of the Acts of 1969 is hereby amended by in-

serting after section 4 the following section: ---

Section 4A. The department shall establish standard procedures to provide controls and accountability for the personal funds of residents who receive medical assistance in nursing homes, rest homes, and convalescent homes for whom said funds are managed by a fiduciary or for whom said funds are held in trust by the nursing home, rest home, or convalescent home administrator in an individual or aggregate personal care trust fund. Such procedures shall insure that personal funds are used only for the use and benefit of the resident , provided such procedures are consistent with existing federal laws and regulations and with any orders by a court of competent jurisdiction. Such procedures shall require all fiduciaries of persons residing in nursing homes, rest homes, or convalescent homes to register with the department on a form supplied by the department. Such procedures shall also require an annual report by the fiduciary to the department on a form supplied by the department indicating the manner in which personal funds were managed by the fiduciary during the report period under threat of the penalty for perjury as provided for in sections 1 and 1A of chapter 268 of the General Laws.

If a fiduciary fails to register with the department or fails to submit an annual report to the department, the department shall be authorized to petition for removal of the fiduciary and the appointment of a substitute.

or fraudulently converts or appropriates money, goods , or property held or possessed by him for the use and benefit of the resident shall be subject to penalties prescribed in Section 57 of chapter 266 of the General Laws and shall make full restitution of said money , goods, or property.

Appendix F: The manual is not included because of printing cost restrictions. Copies of the manual can be obtained from:

Office of Federal/State Resources
One Ashburton Place
Boston, Massachusetts 02108

REPRESENTATIVE PAYEES: WHAT THEY ARE AND HOW TO DEAL WITH THEM

Commission on the Legal and Civil
Rights of the Developmentally Disabled

Prepared by: Sarah W. Hosmer
May, 1976

Appendix G

AN ACT CONCERNING MEDICAL TREATMENT AND MEDICAL CONSENT OF INSTITUTIONALIZED PERSONS.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. Section 1 of Chapter 123 of the General Laws as most recently amended by Sections 1 and 1A of Chapter 760 of the Acts of 1971 is hereby further amended by inserting after the definition of "District Court" the following definition:

"Essential surgery:" surgery that is medically indicated, including dental surgery, which is necessary for the protection of life or health, but which does not include convulsive therapy, psychosurgery, aversion therapy, sterilization, experimental procedures, psychotropic drug therapy, any unusual or hazardous treatment procedure, or any other form of treatment designated by the Attorney General, in compliance with section 3 of Chapter 30A, as a potential infringement of the civil rights of patients.

SECTION 2. Section 23 of Chapter 123 of the General Laws as most recently amended by Chapter 291 of the Acts of 1974 is hereby further amended by striking out the last clause of the fifth paragraph beginning with the words "And provided, further, that..." and ending with the words "Nearest living relative" and by inserting after the words "These rights" in the fifth paragraph

the following:

Except the right to refuse shock treatment and psychosurgery.

SECTION 3. Chapter 123 of the General Laws is hereby further amended by inserting after section 23 the following section:

Section 23A. Each person within the care of the department shall be provided with prompt and adequate medical treatment for any physical or mental disease or injury. Except as otherwise provided for in this section, the attending physician shall provide all information, including expected and potential physical and medical consequences of the proposed treatment, necessary to enable any resident of a state facility to give fully informed, competent, and voluntary consent if surgery, convulsive therapy, psychosurgery, aversion therapy, sterilization, experimental procedures, psychotropic drug therapy, any unusual or hazardous treatment procedures, or any other form of treatment designated by the Attorney General, pursuant to section 3 of Chapter 30A, as a potential infringement of the civil rights of residents, are proposed. No resident shall be subjected to any of the treatments named in the foregoing sentence without his or her informed, competent, and voluntary consent.

If the resident is physically unable to receive the information required for informed consent pursuant to this section, or if such information has been provided to him but he is unable to comprehend such information, essential surgery may be performed with the informed, competent, and voluntary consent of the

resident's guardian or temporary guardian, if one has been appointed, or, if no guardian has been appointed, with the consent of the resident's spouse or next of kin; provided, however, that no substituted consent of a guardian, spouse, or next of kin shall be valid unless the resident is actually unable to understand the possible risks and benefits of the proposed treatment; and provided, further, that such guardian or temporary guardian is not an employee, officer, or agent of the institution in which the resident is placed.

If the resident is unable to provide valid medical consent as specified in this section, convulsive therapy or psychotropic drug therapy may be administered only with the informed, competent, and voluntary consent of the resident's legally appointed guardian, provided that the guardian has first petitioned a Probate Court, under the provisions of section 45 of Chapter 201, and obtained the approval of the Court for the waiver of the resident's right to refuse treatment, after the Court has duly notified the resident and provided an opportunity for a hearing on the petition; provided, however, that such guardian is not an employee, officer, or agent of the institution where the resident is placed. In the case of a person who has been involuntarily committed to a psychiatric hospital under the provisions of Chapter 123, psychotropic drugs may be administered during the first four weeks following committment without compliance with the terms of this section.

When a medical emergency exists in which delay in administering treatment would create a grave danger to the health of the person,

and the person is unable to give informed consent as specified in this section, and no guardian, spouse, or next or kin can reasonably be contacted, essential surgery may be performed upon the authorization of the chief medical officer of the institution.

No defendant in a civil action of assault or battery shall raises the defenses of consent or immunity from liability under the provisions of section 79 of Chapter 123 unless the applicable terms of this section have been complied with. No provision herein shall be construed as limiting any other rights, remedies, or defenses previously existing at law or equity.

Appendix H: Initial Draft

AN ACT PROVIDING FOR COMMUNITY RESIDENTIAL FACILITIES IN RESIDENTIAL ZONES.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. Chapter 40A of the General Laws is hereby amended by inserting after section 3 the following new section:

Section 3A. It is the policy of the Commonwealth that developmentally disabled or otherwise physically or mentally handicapped persons, and children in need of residential care should not be excluded by local zoning ordinances or by-laws from the benefits of normal residential surroundings.

As used in this section, the term "community residential facility" shall mean a group care facility, group home, or other facility providing a residence and care for developmentally disabled or otherwise physically or mentally handicapped persons, or children in need of group residential care, which meets required state licensing and regulatory requirements for such facilities. Nothing herein shall be construed to include foster homes as community residential facilities.

Pursuant to the above policy, community residential facilities serving twelve or fewer persons shall be permitted use in all residential zones, including, but not limited to, residential zones for single family dwellings. Community residential facilities serving thirteen through twenty persons shall be permitted use in all residential zones for multifamily dwellings. Nothing in this section shall be construed to prohibit

any city or town from requiring a special permit in order to maintain any community residential facility pursuant to the provisions of this section. Such special permit shall be issued, notwithstanding the voting requirements of section 9 of this chapter, unless the board of appeals established under section 14, or the city council of such city, or the selectmen of such town, as such ordinance or by-law may provide, finds that such use will result in excessive concentration of community residential facilities within the city or town. Any concentration of community residential facilities which would not increase the number of persons living in those facilities beyond one per cent of the total number of persons living in the city or town (as determined by the latest United States or Commonwealth census) shall be presumed not to be excessive, unless two such facilities would be located less than three hundred feet apart.

Such special permit may be issued with reasonable conditions, including the condition that the facility obtain licensure or approval from appropriate state agencies within ninety days of the issuance of the permit, and comply with all applicable state laws and regulations; provided, however, that no condition shall be imposed concerning bulk and height of structures, yard sizes, lot area, set backs, open space, parking, and building coverage which are more restrictive than those limitations which the by-laws place on other residential dwellings in the same zones.

Appendix H: Amended Version

The Commonwealth of Massachusetts

IN THE YEAR ONE THOUSAND NINE HUNDRED AND SEVENTY-SIX

AN ACT PROVIDING FOR COMMUNITY RESIDENTIAL FACILITIES IN RESIDENTIAL ZONES.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows

SECTION 1. SECTION 9 of chapter 40A, as most recently amended by chapter 803 of the Acts of 1975, is further amended by adding at the end of section 9 the following:-

Zoning ordinances or by-laws shall provide in all districts for a group care facility use or a group home use for seven or more people, which may be permitted upon the issuance of a special permit. Ordinances or by-laws shall also provide in all districts for a group care facility use or a group home use for six or fewer people which shall be issued by the special permit granting authority if the special permit granting authority finds that the applicant use would not bring the number of people living in group care facilities or group homes in a city or town to a level in excess of one percent of the total number of residents of the city or town and further that such applicant use is not within three hundred feet of an existing group care facility or group home. Nothing in this paragraph

shall be construed from preventing a city or town from adopting reasonable regulations for group care facilities or group homes concerning bulk, height, yard size, lot area, setback, open space, parking, density (except as provided herein), and building coverage.

Group care facility or group home shall mean a facility or residence, excluding foster homes, providing care for mentally retarded or physically handicapped people or emotionally disturbed children under the age of fourteen, which meets the required state licensing and regulatory requirements for group homes or group care facilities.

SENATE . . . . . No. 1190

By Mr. Atkins, a petition (accompanied by bill, Senate, No. 1190) of Chester G. Atkins for legislation to authorize the Massachusetts Housing Finance Agency to develop housing for the elderly and handicapped. Urban Affairs.

The Commonwealth of Massachusetts

In the Year One Thousand Nine Hundred and Seventy-Six.

AN ACT AUTHORIZING THE MASSACHUSETTS HOUSING FINANCE AGENCY TO DEVELOP HOUSING FOR THE ELDERLY AND HANDICAPPED.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. Section 1 of chapter 708 of the acts of 1966, as most recently amended by section 15 of chapter 1215 of the acts of 1973, is hereby amended by striking out section (d) and inserting in place thereof the following paragraph: —

(d) "low income persons and families" shall mean those persons and families, including elderly or handicapped families whose annual income is equal to or less than the maximum amount which would make them eligible for units owned or leased by the housing authority in the city or town in which the project is located or, in the event that there is no housing authority, that amount which is established as the maximum for eligibility for low-rent units by the department of community affairs.

SECTION 2. Section 1 of chapter 708 of the acts of 1966, as most recently amended by Section 15 of chapter 1215 of the acts of 1973, is hereby further amended by striking out paragraph (g) and inserting in place thereof the following paragraph: —

(g) "project" shall mean a number of dwelling units constructed, rehabilitated or converted to a cooperative or condominium with the assistance of a mortgage loan from the MHFA, including community residences, intermediate care facilities or other such forms of congregate housing for elderly or handicapped families.

SECTION 3. Section 1 of chapter 708 of the acts of 1966, as most recently amended by section 15 of chapter 1215 of the acts of 1973, is hereby further amended by adding the following new paragraph: —

(h) "elderly or handicapped families" shall mean families which consist of two or more persons and the head of which (or his spouse) is sixty-two years of age or over or is handicapped, and such term also means a single person who is sixty-two years of age or over or is handicapped. A person shall be considered handicapped if such person is handicapped as defined in Section 202 of the Housing Act of 1959 (12 USCA 1701q), as amended.

SECTION 4. Section 1 of chapter 708 of the acts of 1966, as most recently amended by section 15 of chapter 1215 of the acts of 1973, is hereby further amended by adding the following new paragraph: —

(i) "dwelling unit" shall mean a unit which includes a bedroom, living space, bathroom and kitchen except when constructed as part of a community residence, intermediate care facility or other such form of congregate housing for the elderly or handicapped, in which case each separate bedroom shall be considered a dwelling unit.

SECTION 5. Section 1 of chapter 708 of the acts of 1966, as most recently amended by section 15 of chapter 1215 of the acts of 1973, is hereby further amended by adding the following new paragraph: —

(j) "displaced by public action" shall mean displacement by highway construction, urban renewal, slum clearance, deinstitutionalization of state facilities or other displacement caused by governmental action.

SECTION 6. Chapter 708 of the acts of 1966 is hereby amended by striking out section 2 and inserting in place thereof the following section: —

Section 2. (a) It is hereby declared that as a result of public actions involving highways, public facilities and urban renewal programs, and as a result of the spread of slim conditions and blight to formerly sound neighborhoods, there now

exists in many cities and towns in the commonwealth an acute shortage of decent, safe, and sanitary housing available at low rentals which persons and families of low income, elderly or handicapped families, and veterans who have returned from Vietnam can afford. This shortage is inimical to the safety, health, morals, and welfare of the residents of the commonwealth and the sound growth of the communities therein. The continued inadequacy of the supply of such housing inhibits the carrying out of needed slum clearance projects and results in the continued existence and proliferation of substandard and decadent housing, with all its attendant consequences of disease, crime, injuries, retardation of education, and high costs for municipal services, such as welfare, police and fire protection. This public exigency, emergency, and distress has not been met in any way by private agencies. Private enterprise, without the assistance contemplated by this act, cannot achieve the construction of decent, safe, and sanitary housing at rentals which persons and families of low income can afford in situations where permanent betterment of living conditions is to be hoped for. Moreover, experience has demonstrated that concentration of low income persons and families even in standard structures built with public subsidy does not eliminate undersirable social conditions and does not permanently eliminate slum conditions. It is therefore imperative that the cost of mortgage financing, which materially affects rental levels in units built by private enterprise be made lower so as to reduce rental levels for these low income persons and families, that the supply of housing for persons and families displaced by public action or natural disaster be increased, and that private enterprise be encouraged to build housing which will prevent the recurrence of slum conditions and assist in their permanent elimination by housing persons of varied economic means in the same projects or neighborhoods.

(b) It is hereby further declared that there is not, in certain parts of the commonwealth, an adequate supply of decent, safe, and sanitary housing suitable for occupancy by elderly or handicapped families; that this situation has been aggravated by public actions involving the deinstitutionalization of state schools, state residential centers, and other public institutions

providing housing for the elderly or handicapped; that this situation results in the inappropriate placement of such persons in public and private institutions or their resort to decadent or substandard housing with the result that such decadent or substandard housing cannot be eliminated; that this situation increases the hardship of elderly or handicapped families and prevents their living productive lives; that it is imperative that the supply of housing for elderly or handicapped families be increased and that private enterprise be encouraged to build housing, including community residences, intermediate care facilities or other such forms of congregate housing which will enable the elderly or handicapped to achieve maximum personal independence; that the continued inadequacy of the supply of such housing is inimical to the safety, health, morals, and welfare of the residents of the commonwealth; and that the provision of housing for elderly or handicapped families is in the interest of the commonwealth and a valid public purpose.

SECTION 7. Section 4 of chapter 708 of the acts of 1966, as most recently amended by section 1 of chapter 689 of the acts of 1974, is hereby amended by adding the following new paragraph: —

(u) Make first mortgage loans, including mortgages insured by the secretary of housing and urban development, to finance the building or rehabilitation of housing designed as community residences, intermediate care facilities or other such forms of congregate housing, to be available at low and moderate rentals for elderly or handicapped families and which are accessible to the physically handicapped upon the terms set forth in section five, and pursuant to regulations adopted by it, make seed money loans to nonprofit developers of such housing.

SECTION 8. Section 5 of chapter 708 of the acts of 1966, as most recently amended by section 16 of chapter 1215 of the acts of 1973, is hereby amended by striking out paragraph (a) and inserting in place thereof the following paragraph: —

(a) *Purpose.* — The MHFA may make mortgage loans to sponsors of such housing projects containing two or more dwelling units as in the judgment of the MHFA have promise of supplying well planned, well designed dwelling units which

will provide housing for low-income persons or families or elderly or handicapped families in locations where there is a need for such housing. Such loans may include construction loans and permanent loans. Such projects may include ancillary commercial facilities to the extent permitted by the then applicable MHFA regulations. On all construction loans for the construction of eleven or more dwelling units the MHFA shall require (1) the payment of prevailing wages as determined by the commissioner of labor and industries as provided in sections twenty-six to twenty-seven D of chapter one hundred and forty-nine of the General Laws, and said commissioner shall enforce the provisions of said sections, and (2) a bond furnished by the sponsor or an equilavent escrow arrangement with the sponsor and supervised by the MHFA to assure payment out of the construction loan funds for all labor and materials for which claimants would have been able to claim a mechanic's lien if the claimants had complied with the provisions of chapter two hundred and fifty-four.

SECTION 9. Section 5 of chapter 708 of the acts of 1966, as most recently amended by section 16 of chapter 1215 of the acts of 1973, is hereby amended by striking out paragraph (g) and inserting in place thereof the following paragraph: —

(g) *Findings.* — Prior to making a loan commitment or loan under this act, the MHFA shall find (1) that low income persons and families can afford the adjusted rentals set for twenty-five per cent of the units in the proposed project on the basis of the use of not more than twenty-five per cent of annual income, (2) that there exists a shortage of decent, safe, and sanitary housing at low rents available to persons and families of low income or that there exists a shortage of decent, safe, sanitary, or inadequate housing for elderly or handicapped families within the general housing market area to be served by the proposed project, (3) that private enterprise without the assistance contemplated by this act cannot supply such housing, (4) that such project either is itself designed to house persons and families of varied economic means or will not create or contribute to an undue concentration of low income families or elderly or handicapped families in any one

neighborhood, and (5) that programs of public agencies within the general housing market area to be served by the project have accomplished or will accomplish within the next five years the elimination by demolition, condemnation, effective closing, or compulsory repair or improvement of unsafe or unsanitary dwelling units situated within such market area substantially equal in number to the number of units to be provided by such project provided that the accomplishment of such elimination may be deferred beyond the five-year period in any general housing market area where there continues to be an acute shortage of decent, safe, sanitary, or adequate housing available to persons and families of low-income or to elderly or handicapped families.

SECTION 10. Chapter 708 of the acts of 1966 is hereby amended by striking out section 11 and inserting in place thereof the following section: —

Section 11. — To assist the MHFA in the discharge of its duties, the governor shall appoint from among interested citizens of the commonwealth an advisory committee of fifteen persons, including persons with experience or training in urban renewal, building, social work, mental health, public health and welfare, housing for the elderly and handicapped, mortgage financing, the municipal bond market, architecture, land use planning, and municipal government. It shall be the role of the advisory committee to assist the MHFA and its staff in formulating policies and procedures dealing with site selection, tenant selection rent levels, design objectives, and such other questions relevant to the MHFA's underlying goals or providing housing for low income families, attaining balanced and attractive communities, and alleviating the hardship which results from deinstitutionalization and the insufficient production of housing for elderly or handicapped families.

Members of the advisory committee shall receive no compensation. They shall not be subject to the provisions of chapter thirty-one or chapter two hundred and sixty-eight A.

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SECTION 11. Chapter 708 of the acts of 1966 is hereby

amended by inserting after section 15B the following new section: —

Section 15C. The MHFA, to the extent possible consistent with sound fiscal management and good housing development planning, shall make full use of available federal and state housing subsidy programs.